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MASSACHUSETTS REPORTS

147

CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

MAY 1888 — NOVEMBER 1888

WILLIAM V KELLEN
REPORTER

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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS MORTON, CHIEF JUSTICE.

HON. WALBRIDGE A. FIELD.

HON. CHARLES DEVENS.

HON. WILLIAM ALLEN.

HON. CHARLES ALLEN.

HON. OLIVER WENDELL HOLMES, JR.

HON. MARCUS P. KNOWLTON.

ATTORNEY GENERAL.

HON. ANDREW J. WATERMAN.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

CELENDE T. DOW *vs.* HENRY M. WHITNEY.

Suffolk. March 26, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Equity — Specific Performance — Sale of Land — Title — Defect.

A statement in a deed, after a specific description of the granted premises, that they were the same as were conveyed to the grantor by certain deeds which covered a larger tract, and reciting the conveyance to the grantee of "all the land conveyed to me by the deeds aforesaid except such portions thereof as I have heretofore sold," will not operate to alter the description or to limit the prior granting clause of the deed, but is a reference merely to the grantor's chain of title.

A deed of "all the interest" of a grantor in land conveys the same title as a deed of the land, and, if it contains a specific description thereof and the usual covenants of warranty, is good against any prior unrecorded deed of the grantor.

The possible existence of unrecorded deeds is not such a defect in a title as should lead a court of equity to deny specific performance of a contract for the sale of land, if there is no evidence of such deeds.

BILL IN EQUITY, filed August 7, 1887, for the specific performance by the defendant of an agreement to purchase land. The facts of the case are as follows.

On November 2, 1857, Stephen Dow became the owner of a tract of land in Brookline, including the premises in question, by deeds, which were duly recorded, from Samuel A. Robinson and others, and from Otis Withington, and subsequently

conveyed portions of it, other than such premises, to different persons by deeds also recorded.

On November 1, 1878, Stephen Dow, by a deed, which contained the usual covenants of warranty, conveyed to "Alfred A. Dow, his heirs and assigns, all my interest in all that lot of land, with the buildings thereon, situated on Corey Hill, in Brookline, in the county of Norfolk and Commonwealth aforesaid, bounded on the north by Summit Avenue; east by land now or late of William Woods; north again by said Woods; east again by land now or late of Thomas Griggs; south by land of Henry M. Whitney, land of Mrs. John M. Clark, and Beacon Street; and west by land now or late of E. D. Jordan et al., formerly of James Bartlett; being the same premises conveyed to me by S. A. Robinson et al., also by Otis Withington, by deed dated November 2, 1857, and recorded with Norfolk Deeds, book 261, page 279, . . . hereby conveying to said grantee all the land conveyed to me by the deeds aforesaid, except such portions thereof as I have heretofore sold."

On October 1, 1879, Alfred A. Dow, by a deed of like tenor as the above, conveyed "all my interest" in the same land to the plaintiff, who, on February 23, 1887, entered into an agreement in writing with the defendant for its sale and purchase, she to give a "good and clear title to the same free from all incumbrances."

The defendant contended that the deeds from Stephen Dow to Alfred A. Dow, and from the latter to the plaintiff, conveyed only such interest as each grantor actually had at the time of the delivery thereof, and was subject to possible unrecorded deeds theretofore made by each, but of which there was no evidence, and that the plaintiff could not make title in accordance with the agreement.

Hearing before *C. Allen, J.*, who ordered a decree for the plaintiff; and the defendant appealed to the full court.

H. W. Chaplin & J. R. Carret, for the defendant.

1. The meaning of "right, title, and interest," and like expressions, as between grantor and grantee, is well settled in the cases as to the scope of covenants in a deed of "right, title, and interest." It is held in these cases that such an expression does not undertake to pass the land, but only what the grantor owns

in it. *Comstock v. Smith*, 13 Pick. 116. *Blanchard v. Brooks*, 12 Pick. 47, 66. *Allen v. Holton*, 20 Pick. 458. *Sweet v. Brown*, 12 Met. 175. *Wight v. Shaw*, 5 Cush. 56. And this notwithstanding that a deed is to be construed most strongly against the grantor, and that this construction gives the grantee a covenant only in case he does not need it. Nor does the policy of our registration acts enlarge such expressions, and import into them, as against prior unrecorded deeds, a meaning which in themselves they do not possess. Those acts are not designed to enlarge the bargain; they simply assure to the grantee what he has chosen to buy. Every case which has arisen in this Commonwealth upon a voluntary conveyance has been decided in accordance with this principle. *Adams v. Cuddy*, 13 Pick. 460. *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159. *Fitzgerald v. Libby*, 142 Mass. 235. See also *Coe v. Persons unknown*, 43 Maine, 432; *Walker v. Lincoln*, 45 Maine, 67; *Brown v. Jackson*, 3 Wheat. 449; *Eaton v. Trowbridge*, 38 Mich. 454; *Mills v. Shepard*, 30 Conn. 98.

In some of the cases above cited, stress was indeed laid upon the lack of a specific description. But while generality adds emphasis to the limitation of definitions, it is not the source and foundation of that limitation; as is shown by the covenant cases above cited, in no one of which is the limited definition of "right, title, and interest" rested upon vagueness of description, and in no one of which does it appear that the description was general. In *Allen v. Holton*, *ubi supra*, the description, though not by boundaries, was specific; in *Blanchard v. Brooks*, *Wight v. Shaw*, and *Sweet v. Brown*, *ubi supra*, it was specific.

The expression in Stephen Dow's deed, "all my interest," is weaker than in most of the cases. The term "interest" alone would import to every one a limitation, its definition, according to Webster, being "share; portion; part; participation in value." In *Fitzgerald v. Libby*, *ubi supra*, the description, "my new city," was substantially specific, the locus being a mere tract of building land. Stephen Dow's deed is specific in dealing with an interest in a tract described by metes and bounds.

In *Woodward v. Sartwell*, 129 Mass. 210, a sheriff's deed of "the right, title, and interest" which a debtor "had at the time when the same was attached" on mesne process "in and to" certain described estate, was held to cut off a prior but unrecorded

deed of the debtor. The court do not say, in that case, that a conveyance by the debtor of his "right, title, and interest" made at the time of the attachment would have cut off his unrecorded deed, but speak of "a conveyance made by the debtor," which implies a conveyance of the land. The case of a voluntary conveyance of right, title, and interest by the record owner was not before the court; and *Earle v. Fiske*, where the grantor made a deed "of the premises," cited in the opinion, is not authority for the position that a voluntary deed of a grantor's right, title, and interest cuts off his prior unrecorded deed. *Woodward v. Sartwell* may well be supported, on the ground that the use by the officer of the words "right, title, and interest" should not be permitted to give the creditor a less or different estate from the priority which the statute gives him.

2. In the second description in the deed of Stephen Dow, "being the same premises," etc., the grantor excepts what he has heretofore sold. This description therefore contains as marked a weakness as the first, and emphasizes the grantor's limitation of intent. The authorities would seem to support the position that this description, standing by itself, as a sole description, would let in unrecorded deeds. *Chaffin v. Chaffin*, 4 Gray, 280. *Cook v. Farrington*, 10 Gray, 70. If the phrase "all my interest" be held to mean the land, and not merely the grantor's "interest" therein, the second description would, in that case, work to open the first description to let in unrecorded deeds. *Chaffin v. Chaffin, ubi supra*. The land in question is a large tract in a suburban town, and it might well happen that Stephen Dow had sold and conveyed other portions of the larger tract of which it originally formed a part. If, in conveying the rest of his land, he so framed his deed as to protect all persons holding under him, he did what honesty required. If his deed be construed in accordance with the plaintiff's contention, the grantor, in the words of Chief Justice Shaw in *Adams v. Cuddy*, "might in effect commit a fraud without intending or even being conscious of it." The deed from Alfred A. Dow to the plaintiff is of "all my interest" in the same land, and is open to the same objections.

3. The plaintiff has not a marketable title, and cannot convey "a good and clear title." The defendant, if compelled to

take a conveyance, may afterward be exposed to litigation to defend his title, and should not be compelled in equity to take the premises. *Richmond v. Gray*, 3 Allen, 25. *Sturtevant v. Jaques*, 14 Allen, 523. *Jeffries v. Jeffries*, 117 Mass. 184. *Cunningham v. Blake*, 121 Mass. 333. *Butts v. Andrews*, 136 Mass. 221.

In *Chesman v. Cummings*, 142 Mass. 65, the opinion, at page 67, quotes from *Alexander v. Mills*, L. R. 6 Ch. App. 124, a new rule, "that, even as between vendor and purchaser in such case, . . . the court is bound to ascertain and determine, as it best may, what the law is." But in *Alexander v. Mills*, the court, after stating the rule quoted, recognize, at page 132, that there are exceptions to it, which "will probably be found to consist not in pure questions of legal principle, but in cases where the difficulty and the doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument." And in *Osborne v. Rowlett*, 13 Ch. D. 774, Jessel, M. R., after stating his agreement with what was decided in *Alexander v. Mills*, says that, "in the interests of the purchaser, who has a right to be protected, the old rule was the best." The burden is upon the plaintiff to show a title which is "good beyond a reasonable doubt, and will not expose the defendant to litigation." *Sturtevant v. Jaques*, *ubi supra*. It is no excuse that this requires her to prove a negative. *Lowes v. Lush*, 14 Ves. 547. *Franklin v. Brownlow*, 14 Ves. 550. *Hartley v. Smith*, Buck's B. Cas. 368.

This is a case where there is no possibility of releases ever being got to perfect the title. There is no one to give a release to cover Stephen Dow's deed, unless it be his heirs; and their release would be of no avail, since their aim in giving it would be deemed to be that of cutting off any unrecorded deeds, which would be fraud. The registration laws do not cut off unrecorded deeds for the purpose of cutting them off. The apparent owner of land has two distinct powers: first, the power to sell what he owns, and to assure it to his vendee; secondly, the power, lodged in him by the recording acts from public policy, to sell what somebody else owns. The latter power he must exercise by concealment; when he avows it, it vanishes; and the same is true with regard to his heirs.

A. Hemenway & M. T. Allen, for the plaintiff.

MORTON, C. J. It is clear that the clause following the specific description in Stephen Dow's deed, beginning, "being the same premises," etc., was not intended to limit the prior granting clause of the deed, or to alter the description, but was inserted for the purpose of showing the grantor's chain of title. *Lovejoy v. Lovett*, 124 Mass. 270.

The principal question in this case is whether the deed of Stephen Dow conveyed to the grantee a title which is superior to that of any grantee by a prior unrecorded deed of the grantor. This question was fully considered and discussed in *Woodward v. Sartwell*, 129 Mass. 210. In that case, it was held that a deed by an officer, upon a sale on execution of "all the right, title, and interest" of the judgment debtor in land specifically described in the deed, took precedence of a prior unrecorded deed of the judgment debtor, and conveyed to the purchaser a good title. The court put the decision upon the ground, that an attaching creditor has the same standing as a *bona fide* purchaser, and that the deed of the officer "is equivalent to a conveyance made by the debtor at the time the attachment was made; and in the case at bar, as the record title then stood in the name of the debtor, as to *bona fide* purchasers, he was the owner of the land."

We are satisfied that these views are correct. We can see no sound distinction between a deed made by an officer upon a sale on execution, and a deed made by the debtor himself. In either case, the deed conveys all the title which the debtor had, and no more; but a prior unrecorded deed has no effect except as between the parties to it, and others having notice of it, and as to creditors and purchasers leaves the title in the grantor. *Earle v. Fiske*, 103 Mass. 491.

A deed of "all the right, title, and interest," or of "all the interest," of the grantor in a lot of land, conveys the same title as a deed of the land. It is the policy of our laws that a purchaser of land, by examining the registry of deeds, may ascertain the title of his grantor. If there is no recorded deed, he has the right to assume that the record title is the true title. The law has established the rule, for the protection of creditors and purchasers, that an unrecorded deed, if unknown to them, is as to them a mere nullity. The reasons for the rule apply with equal

force in the case of a deed of the grantee's right, title, and interest, as in that of a deed of the land. We are of opinion, therefore, that the deed of Stephen Dow conveyed to his grantee a title which is good against any prior deed, if unrecorded. To hold otherwise would defeat the purpose of the registration laws, and create confusion in the titles to land.

It is to be noticed that the deed in this case contains a specific description of the land intended to be conveyed, and contains the usual covenants of warranty. The case is thus distinguished from a class of cases relied upon by the defendant, in which it has been held that, where a deed contains no particular description, but only a general description, like "all my land," or "all the land I have in Boston," or other similar general description, it does not take precedence of prior unrecorded deeds of the grantor. See *Adams v. Cuddy*, 18 Pick. 460; *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159; *Fitzgerald v. Libby*, 142 Mass. 235. In each of these cases the question was not as to the effect of a prior unrecorded deed of the same land, but it was whether the land previously sold was included within the description of the later deed. In other words it was a question of the construction of the deed relied upon. No such question can arise in the case at bar, as the description of the land intended to be conveyed is specific and exact. The same considerations apply to the deed from Alfred A. Dow to the plaintiff.

The defendant contends that specific performance of his contract ought not to be decreed, because, if compelled to take a conveyance, he may afterwards be exposed to litigation to defend his title. It is not known that there is any unrecorded deed made by Stephen Dow or Alfred A. Dow. The only alleged defect is, that there is a possibility that there is such a deed, and that the grantee in it may hereafter appear and contest the defendant's title.

The defendant ought not to be required to accept a title that is doubtful. But in this case there is no reasonable doubt that the plaintiff's deed conveys a good title. Its validity depends upon a pure question of law, and no question of fact is involved. The mere possibility that a claimant may hereafter appear and ask the court to overturn a well settled rule of law is not such a defect or doubt in the title as ought to lead the court in its dis-

cretion to deny to the plaintiff the right in equity to a specific performance of the contract. *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400. *Chesman v. Cummings*, 142 Mass. 65.

As the parties agree to the form of the decree entered by the justice who heard the case, it should therefore be affirmed.

Decree affirmed.

CHARLES P. GORELEY vs. BENJAMIN F. BUTLER.

Suffolk. March 14, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Alabama Claims — Insolvent Debtor — Constitutional Law — Money had and Received.

A claim within the U. S. St. of June 5, 1882, and presented thereunder to the Court of Commissioners of Alabama Claims by one who subsequently and before its allowance becomes insolvent, is "property" such as will pass to his assignee under the Pub. Sts. c. 157, §§ 44, 46.

A draft issued by the United States upon the allowance of the claim, was paid to the wrong person, who, after a demand upon him by the assignee for the draft, advised the insolvent's widow to take out administration, and signed her bond, with the agreement that he should retain the draft and its proceeds as security. *Held*, that the assignee might recover the proceeds from him in an action for money had and received.

CONTRACT, by the assignee in insolvency of the estate of Isaac H. Taylor, for money had and received. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on an agreed statement of facts, in substance as follows.

On or about June 14, 1863, Taylor, who was a passenger on board the barque Good Hope, lost his personal effects and sustained other damages by reason of that vessel's capture and destruction by the Georgia, a tender of the Confederate cruiser Alabama. On January 13, 1883, Taylor filed a claim for such damages in the Court of Commissioners of Alabama Claims, and subsequently that court awarded to him the sum of \$3,785.25 and interest, amounting in all to \$5,874.15, which represented the actual loss and damage sustained by him. On June 20,

1883, Taylor, who was a citizen of Boston, filed a voluntary petition in insolvency in the Court of Insolvency for the county of Suffolk, and on July 20, 1883, the plaintiff was duly appointed assignee of his estate, and a legal assignment thereof duly issued to him. A schedule of the assets of the estate did not disclose such claim, no other assets of value were received by the assignee, and no discharge was ever granted to the insolvent. On February 20, 1885, a draft issued from the United States Treasury for the amount of the award payable to the order of Taylor, and was sent to the defendant and others, the attorneys of record, and was duly received by them.

Taylor died at Boston, intestate, on February 24, 1885, and thereupon his widow applied to the defendant for the payment over to her of the award. The defendant advised her that such payment could not be made to her unless she took out letters of administration in the District of Columbia, and accordingly she accompanied him to Washington, and on March 7, 1885 applied to the Probate Court of the District for letters of administration. On March 31, 1885, she was duly appointed administratrix, and the defendant signed her bond as surety, under an agreement with her to retain the draft and the proceeds thereof as security for his undertaking. No appraisal was ever made of the estate, nor had the widow performed any act as such administratrix. The plaintiff made a demand upon the defendant for the draft before the petition by the widow to be appointed administratrix was filed, and notified the defendant that he was the assignee of Taylor's estate, and as such entitled to the draft and the proceeds thereof. On April 4, 1885, the widow gave a power of attorney to the defendant to indorse the draft and receive payment thereon, and the defendant thereupon received the proceeds of the draft, paying therefrom, before this action was brought and without the knowledge of the plaintiff, attorney's fees to the amount of \$1,087, and the sum of \$126 for the intestate's funeral expenses.

The Treaty of Washington between the United States and Great Britain, promulgated July 4, 1871, the Award of the Tribunal of Arbitration at Geneva, made September 17, 1872, the acts of Congress of June 23, 1874, and June 5, 1882, which, it was agreed, made provision for the payment of losses suffered

through certain cruisers, called the "inculpatated cruisers," among which was the *Georgia*, the laws of Maryland as continued in force by the laws of the District of Columbia, and the laws of the District of Columbia, are to be treated as facts in this case, and may be referred to at the argument.

If the plaintiff was entitled to recover, judgment was to be entered for him for the sum of \$4,661.15, and interest thereon; otherwise, the plaintiff was to become nonsuit.

B. F. Butler, (*F. L. Washburn* with him,) for the defendant.

C. L. Woodbury & W. H. H. Andrews, for the plaintiff.

HOLMES, J. So far as appears, the claim of the insolvent for losses by a tender of the *Alabama* was within the act of Congress of June 23, 1874, and therefore probably this case is governed by *Leonard v. Nye*, 125 Mass. 455; *Jones v. Dexter*, 125 Mass. 469, 471. But it is unnecessary to stop at this point, because, whatever the original nature of the claim, the act of June 5, 1882, had been passed, and proceedings under it had been begun by the insolvent, before the dates when he filed his petition in insolvency and the plaintiff was made his assignee.

The insolvent act provides that "the assignment shall vest in the assignee all the property of the debtor, real and personal," etc. Pub. Sts. c. 157, § 46. When the sovereign power has established a claim against itself, or against a fund in its hands, and has provided a tribunal and all necessary machinery for its establishment and collection, such a claim is "property" within the meaning of the act.

If the claim is established in pursuance of what would have been an antecedent legal duty on the part of the sovereign but for its sovereignty, the proposition which we lay down follows *a fortiori* from decisions like *Leonard v. Nye*, *Jones v. Dexter*, *ubi supra*, and *Comegys v. Vasse*, 1 Pet. 193, that some claims against the sovereign will pass in bankruptcy or insolvency, although the act which recognizes and makes them effectual is not passed until after the assignment. These cases dispose of any general objection that claims against the sovereign cannot be legal rights in a strict juridical sense. Such claims are given all the incidents of property by law, although, since the continued recognition of them until they can be proved, and the final payment of them, depend upon the will of the sovereign, — that is,

upon the law remaining unchanged, as in the usual case of claims against subjects, — such recognition and payment in this case depend upon the honor of the quasi debtor or trustee, and not upon a superior power, stranger to the undertaking.

The English courts, although they have hardly gone so far as the courts of this country, have treated as property within the English bankrupt act a pension granted on the retirement of a public officer, (possibly in pursuance of some sort of understanding at the time of his taking office,) which depended for its payment on an annual vote of a colonial legislature. *Ex parte Huggins*, 21 Ch. D. 85. In this case, it is suggested, and we agree, that it could not be doubted that bonds of a foreign or of the home government would be property.

If now the claim which the statute establishes, instead of being based upon some sort of consideration, is granted as a pure gratuity, as in *Heard v. Sturgis*, 146 Mass. 545, still, when granted, it is just as absolute a claim, it is to the same extent and in the same sense a legal claim, and it has the same security for being paid, as the other. It depends upon the will of the sovereign no more than the other. It is not like the case of an allowance depending for its continuance on the will of a private individual, who pays it, as in *In re Wicks*, 17 Ch. D. 70, or upon the discretion of a subordinate public officer, as in *Ex parte Webber*, 18 Q. B. D. 111.

It was argued that, by force of the U. S. Rev. Sts. § 3477, this claim could not be assigned in insolvency before it was allowed. Assuming that that section applies to claims like the present, (*Stevens v. United States*, February 26, 1883, in Rules, Opinions, &c. of Court of Comm. of Ala. Claims, Washington, 1885,) it does not apply to assignments in bankruptcy, although upon a voluntary petition, (*Erwin v. United States*, 97 U. S. 392,) and by parity of reasoning it does not apply to assignments in insolvency. If it should be suggested that, although property of the insolvent, it was not property "which he could have lawfully assigned" in person, and therefore was not within the words of the State insolvent act, the answer is, that it is clearly within the general intent of the Pub. Sts. c. 157, §§ 44, 46, and that it is within the specific words "rights of action for goods or estate, real or personal." *Jones v. Dexter, ubi supra.*

It was suggested that we should reconsider the question of the constitutionality of the State insolvent law, on the ground of a recent decision of the Supreme Court of the United States upon the clause of the Constitution touching the regulation of commerce. *Wabash, St. Louis, & Pacific Railway v. Illinois*, 118 U. S. 557. We discover no indication in that case that the majority intended to disturb the decision in *Ogden v. Saunders*, 12 Wheat. 213, and the cases which have followed it. If what has been understood for sixty years to be the law, and what the Supreme Court of the United States has pronounced "settled and forever closed," is to be overthrown, it must be done elsewhere than in this court. *Baldwin v. Hale*, 1 Wall. 223, 228. *Boyle v. Zacharie*, 6 Pet. 348; *S. C.* 6 Pet. 635, 643. *Blanchard v. Russell*, 13 Mass. 1, 16. *Day v. Bardwell*, 97 Mass. 246, 250. *Barton v. White*, 144 Mass. 281.

Finally, it was argued that this action could not be maintained against the present defendant. We see no ground for doubt. The plaintiff had no notice of the proceedings instituted by his insolvent, until the latter had got his judgment, and a draft for the amount was in the defendant's hands. Then the plaintiff demanded the draft, and was entitled to receive it. *Quimby v. Carr*, 7 Allen, 417. *Cook v. Holbrook*, 6 Allen, 572, 573. *Cox v. Prentice*, 3 M. & S. 344. The fact that the defendant subsequently advised the widow of the insolvent to take out administration in Washington, that she did so, and that he signed her bond, with an agreement that he should retain the draft as security, cannot better his case. It is asked, why, if the claim of the insolvent passed to the plaintiff, he cannot recover against the United States, notwithstanding a payment by them to the wrong person. The answer is, that it is settled that the effect of the judgment of the court was to appropriate a fund to the claim, and to transfer the claim to that fund, leaving the question of title open to subsequent litigation in the ordinary courts. The statute does not leave the United States subject to be charged a second time, any more than, on the other hand, it makes the decision of the Court of Commissioners of Alabama Claims conclusive as to the person entitled to its bounty.

Judgment for the plaintiff.

RICHARD T. LOMBARD vs. JAMES L. WILLIS & others.

Middlesex. March 22, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Devise and Legacy — Children.

A testator, after giving, by a clause in his will afterwards revoked, the income of a part of his estate to a nephew for life, such portion to go at the nephew's decease to his children "who may be then living," gave the income of the residue to the nephew also for life with a devise over "at his decease" of such residue to his "children," without more. *Held*, that the devise included all the nephew's children living at the testator's death.

APPEAL from a decree of the Probate Court, upon a petition by Richard T. Lombard, trustee under the will of David Lincoln, that, by the eighth clause of the will, the residue of the estate vested in the children of James P. Willis who were living at the testator's death. Hearing before *Knowlton, J.*, upon the pleadings, and an agreed statement of facts, in substance as follows.

The will contained the following provisions, which alone are material:

"2d. I give and bequeath to my nephew, James P. Willis of Sudbury, now residing in my house, the use, income, and improvement of all my real estate that may be in my possession at my decease, that is situated in the town of Sudbury, during his natural life, and at his decease I give and bequeath said real estate to the children of said James P. Willis (who may be then living) to be divided in equal shares between them."

"8th. I give and bequeath to my nephew James P. Willis the use, income, and improvement of all the rest, residue, and remainder of my estate, both real and personal, of whatever name or nature, and wherever the same may be situated, (after paying the aforesaid legacies, debts, and charges of administration,) and at his decease I give and devise said estate to the children of said James P. Willis, to be equally divided between them, — meaning and intending hereby to exclude all my heirs not herein named from any part of my estate."

A codicil, annexed to the will, recited the ratification of the will in all respects, "save in particular so far as relates to the

disposition of my real estate, which may be in my possession at my decease, in the town of Sudbury, the use, income, and improvement of which is given by said will to my nephew James P. Willis of said Sudbury during his natural life, in which particular I hereby revoke and alter said will."

James P. Willis had five children living at the death of the testator, — James L. Willis, Adeline Parmenter, Charles P. Willis, Albert Willis, and Edward P. Willis. Albert Willis and Edward P. Willis died before their father, the former leaving a widow and one child, an administrator of his estate being duly appointed, and the latter leaving a widow only, who was appointed the administratrix of his estate.

The judge ordered the decree of the Probate Court to be affirmed, and the surviving children of James P. Willis appealed to the full court.

G. C. Travis, for the appellants.

C. H. Pattee & G. E. Betton, for the wife and administrator of Albert Willis.

S. A. Phillips, for the child and administrator of Albert Willis.

C. H. Walcott, for the widow of Edward P. Willis.

HOLMES, J. The eighth clause of the will, after giving the income of the residue to James P. Willis for life, proceeds, "And at his decease I give and devise said estate to the children of said James P. Willis, to be equally divided between them." These words, taken by themselves, include all the children living at the testator's death. The word "children," by itself, means all the children, as much as if they had been named. *Winslow v. Goodwin*, 7 Met. 363, 375. *Barton v. Bigelow*, 4 Gray, 353, 355. The only words which could raise a doubt whether only such children as should survive James P. Willis were meant, on the ground that the gift to them did not take effect until his death, are "at his decease." But these words are construed to refer to the time of payment or possession, and do not postpone the moment when the gift shall operate. So that the construction of the clause is settled. *Shattuck v. Stedman*, 2 Pick. 468. *Childs v. Russell*, 11 Met. 16, 23. *Wight v. Shaw*, 5 Cush. 56, 60. *Fay v. Sylvester*, 2 Gray, 171, 174. *Bowditch v. Andrew*, 8 Allen, 339, 342. *Pike v. Stephenson*, 99 Mass. 188, 190.

It is argued that we may look at the whole will in order to construe any particular part, and that, because another devise in the second clause (afterwards revoked) is limited to the children of James P. Willis who may be living at their father's decease, we should construe the gift in the eighth clause as limited to the same persons. The argument drawn from the second clause cuts both ways. It may be answered, with about equal force, that the omission in the eighth clause of the words "who may be then living," must be presumed to have been made understandingly, and shows a different intent from that expressed in the second. *Pike v. Stephenson, ubi supra*. Possibly, in truth, the testator did not think out the effect of his dispositions very carefully, or have the difference between the two clauses very clearly in mind. But this is simply speculation, and the only safe course is to confine ourselves to the words used in the particular limitation, when those words have a plain meaning. See *Giles v. Melsom*, L. R. 6 H. L. 24, 81. *Decree affirmed.*

JOSEPH WILLARD & another *vs.* STEPHEN LAVENDER.

Suffolk. March 22, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Probate Court — Costs and Expenses — Counsel Fees — Guardian and Ward.

The Probate Court has no power, under the Pub. Sta. c. 156, § 35, as amended by the St. of 1884, c. 131, authorizing it to award to either party "costs" and "expenses" in contested cases, to compel a guardian, on a petition by counsel, to pay for professional services rendered in that and another court for an infant ward; but the remedy is by action against the ward, or on the guardian's bond.

PETITION to the Probate Court by Joseph Willard and Charles Steere, counsellors at law, alleging that they were counsel for Lizzie H. Orrok, a minor; that they had rendered professional services in her behalf according to an account annexed to the petition; and praying that Stephen Lavender, the guardian of her estate, might be ordered to pay to them the amount of their account from the estate. The account an-

nexed recited that the estate was indebted to the petitioners for a balance of two hundred and fifty dollars, for legal services rendered in the Supreme Judicial Court in opposing a petition for a writ of habeas corpus, and in the Probate Court in relation to the custody of the ward, and in other matters not specifically set forth.

On this petition, the judge of probate made a decree that "Stephen Lavender, guardian as aforesaid, be, and he hereby is, authorized and ordered to pay to said petitioners, in full for services rendered on account of said Lizzie H. Orrok, the sum of two hundred and fifty dollars." From this decree the guardian appealed to this court.

The case was heard before *Holmes, J.*, who made a decree, which, after reciting that it appeared that the proceedings in the Probate Court in which the services were rendered were not terminated, and that the decree, if otherwise valid, was for that reason premature, reversed the decree without prejudice, and recommitted the case to the Probate Court. The petitioners appealed to the full court.

J. Willard & C. Steere, pro se.

H. W. Chaplin, for the guardian.

MORTON, C. J. The statute provides that, "in cases contested either before a probate court or before the Supreme Court of Probate, costs in the discretion of the court may be awarded to either party, to be paid by the other, or to either or both parties to be paid out of the estate which is the subject of the controversy, as justice and equity may require." Pub. Sts. c. 156, § 35. After the decision in *Brown v. Corey*, 134 Mass. 249, this was amended by inserting after the word "costs" the words "and expenses." St. 1884, c. 131.

The purpose of the amendment was to give the courts of probate power, in contested cases, to award to either party costs as between solicitor and client, and the expenses of the suit to be paid by the adverse party, or out of the estate, in the discretion of the court, in analogy to proceedings in equity on bills for instructions by executors or trustees. The statute does not apply to the case at bar.

The petitioners' claim is a common law claim for professional services rendered by them for the infant ward. A portion of

the claim is for services rendered in proceedings in the Probate Court, and a portion for services in independent proceedings in the Supreme Judicial Court. Their proper remedy is by a suit at law against the ward, or upon the guardian's bond. *Conant v. Kendall*, 21 Pick. 36. *Hicks v. Chapman*, 10 Allen, 463.

Their petition does not ask for an award under the statute to the ward, of costs and expenses, but is an independent proceeding in their own names to compel the guardian to pay their account out of the estate. The decree of the Probate Court does not purport to be a decree for costs and expenses in proceedings before that court, but is an adjudication that the guardian shall pay the sum of two hundred and fifty dollars in full for services rendered by the petitioners on account of the ward.

The Probate Court had no jurisdiction to entertain the petition, or to make such adjudication.

The record before us does not disclose clearly the nature of the proceedings before the Probate Court, and we cannot now consider whether at their termination the Probate Court can make an allowance to the ward of costs and expenses, to be paid by the guardian out of the estate.

Decree of the Probate Court reversed.

WILLIAM J. WILSON & another vs. DANIEL A. O'CONNELL
& another.

SAME vs. DUDLEY A. DORR.

Suffolk. March 26, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Devise and Legacy — Estate for Life — Remainder in Tail — Deed.

A testator devised one third of his real estate to his daughter "to be enjoyed by her and her husband, should she marry, as long as she lives; become the property of her children, if any, at her decease; and, should she leave no issue, pass immediately at her decease to my heirs at law, without any part, even tenancy by curtesy, remaining in her husband; and should all issue of her die without

issue, their estate shall descend to my heirs at law, this provision comprising only what may come to them through their mother, my daughter." *Held*, that the daughter took an estate for life only, and that, even if her children took a remainder in tail, her deed could not bar the entail.

TWO APPEALS from a decree of the Probate Court, allowing a petition, filed June 8, 1886, by William J. Wilson and Ellen M. Wilson, praying for the payment to them of one third of the net proceeds of a sale by partition commissioners of real estate, the property at his decease of Maurice O'Connell. Hearing before *Devens, J.*, who reported the case for the consideration of the full court, in substance as follows.

The appellants in the first case were Daniel A. O'Connell and John D. O'Connell, the heirs at law of Maurice O'Connell other than Ellen M. Wilson, and the appellant in the second case was the guardian *ad litem* of her unborn children.

Maurice O'Connell died on July 7, 1882, leaving a will, dated August 31, 1881, which, after a gift to his wife of his real estate for life, with power to dispose of all his personal property absolutely, and with a request that she give his watch, seals, and chain to a grandchild, contained the following provision, which alone is material :

"One third of the real estate, with a like proportion of whatever may remain in her possession of the personal property undisposed of, to the children of my said eldest son, Daniel Aloysius O'Connell, in equal shares, to them, without in any event whatever including my watch, seals, and chain, already assigned specially for Maurice, my grandson; one third to my youngest son John D. O'Connell, M.D., one third of which shall be absolutely the exclusive property of his now only daughter, Honora Josephine O'Connell, which with whatever may be accumulated and left to her by my wife, her grandmother, shall be duly and properly invested for her benefit and absolute control and use when she arrives at the age of twenty-one years; and the remaining one third to my only daughter, Ellen M. O'Connell, to be enjoyed by her and her husband, should she marry, as long as she lives; become the property of her children, if any, at her decease; and, should she leave no issue, pass immediately at her decease to my heirs at law, without any part, even tenancy by curtesy, remaining in her husband;

and should all issue of her die without issue, their estate shall descend to my heirs at law, this provision comprising only what may come to them through their mother, my daughter."

Ellen O'Connell was married to William J. Wilson on September 29, 1881, but has had no children. On November 20, 1885, commissioners were duly appointed, on the petition of John D. O'Connell, to make partition of the real estate, and afterwards the proceeds of a sale duly had were paid over to those entitled thereto, with the exception of the one third in question. On December 5, 1885, Ellen M. Wilson and her husband conveyed an undivided third part of the real estate to George A. Wilson, to bar an alleged entail, a subsequent reconveyance of which was made by him to her.

The questions raised by the appellants were "first, whether the estate devised to said Ellen M. Wilson was an estate tail, which could be barred by the conveyances; and secondly, if it were such, and could be so barred, whether the conveyances were made at a time when they could effectuate that result."

A. Russ & R. Lund, for the appellants.

A. Hemenway, for the appellees.

MORTON, C. J. The decision of these cases depends upon the question, whether Ellen M. Wilson took under the will of her father, Maurice O'Connell, an estate for life, or an estate tail. The clause of the will under which she takes is as follows: "and the remaining one third to my only daughter, Ellen M. O'Connell, to be enjoyed by her and her husband, should she marry, as long as she lives; become the property of her children, if any, at her decease; and, should she leave no issue, pass immediately at her decease to my heirs at law, without any part, even tenancy by curtesy, remaining in her husband; and should all issue of her die without issue, their estate shall descend to my heirs at law, this provision comprising only what may come to them through their mother, my daughter."

We are of opinion, that under this devise Ellen O'Connell took only an estate for life. It contains no words of inheritance; on the contrary, it expressly declares that the estate is "to be enjoyed by her as long as she lives." The natural import of this language is to give her an estate for life, and

the subsequent provision that her husband was not to have any estate by the curtesy shows that the testator did not intend to give her an estate of inheritance, in which case the husband would be entitled to his estate by the curtesy. There is nothing in the other provisions of the will which shows an intention to enlarge this life estate to an estate in tail. In the devise over to her children, if she shall leave any at her decease, otherwise to the testator's heirs at law, the children or the heirs will take as purchasers, and not by limitation. The will therefore gives to the testator's daughter Ellen an estate for life, and a remainder over to her children, if she shall leave any, otherwise to his heirs at law. Any other construction would defeat the intention of the testator. Whether this is a remainder in fee or in tail need not be discussed, because it is immaterial to the decision of this case. If it be conceded to be a remainder in tail, yet it is entirely clear that the life tenant could not, by a deed executed by her, bar the entail. A tenant in tail actually seised of lands may, by a deed, bar the entail and convey an estate in fee simple; or, where lands are held by one person for life with a remainder in tail in another, the tenant for life and the remainderman may bar the entail, and convey the land in fee simple. Pub. Sts. c. 120, §§ 15, 16. But a life tenant alone cannot do this. *Holland v. Cruft*, 3 Gray, 162. *Whittaker v. Whittaker*, 99 Mass. 864. *Allen v. Trustees of Ashley School Fund*, 102 Mass. 262.

It follows, that, as Ellen M. O'Connell had only a life estate in the premises in question, the decree of the Probate Court was erroneous.

Decree reversed.

DORCAS H. CUMMINGS vs. DAVID M. HODGDON.

Suffolk. March 29, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Probate Court — Jurisdiction — Domicil.

A petition was filed in 1885, in the Probate Court of Suffolk County, to declare void a decree made in 1880 appointing an administrator, and to vacate all proceedings therein, on the ground that the intestate, a minor, was domiciled in another county. On appeal, an agreed statement of facts showed that the minor's father, who was domiciled in Roxbury, died in 1867; that the next month the minor's mother took him with her to the other county, where she lived until she died, but whether she changed her domicil to that county was not stated; and that his guardian never changed the minor's domicil, but always intended that he should return to Suffolk. *Held*, that it did not appear that the minor lost his domicil in Suffolk, and that, if he did, the petition under the Pub. Sts. c. 166, § 4, was filed too late.

APPEAL from a decree of the Probate Court allowing a petition filed by Dorcas H. Cummings to declare void a decree appointing the respondent, David M. Hodgdon, administrator of the estate of William C. Hodgdon, a minor, and to vacate all proceedings on the same.

Hearing, on an agreed statement of facts, before *W. Allen, J.*, who ordered the decree of the Probate Court to be reversed; and the petitioner appealed to the full court. The facts appear in the opinion.

C. A. Taber, for the petitioner.

E. B. Powers, for the respondent.

HOLMES, J. This is a petition to declare void a decree of the Probate Court for Suffolk County appointing an administrator of the estate of William C. Hodgdon, a minor, and to vacate all proceedings upon the same. The minor died on February 5, 1880. The administrator was appointed on March 8, 1880, and his final account was allowed on June 28, 1880. On September 10, 1885, a petition was filed by Dorcas H. Cummings, the sole heir at law of William C., to have the account reopened, on the ground of fraud. On December 11, 1885, this petition was filed by her, on the ground that William C. Hodgdon was domiciled,

not in Suffolk, but in Barnstable County, at the time of his death.

At the time of the death of William C. Hodgdon's father, in April, 1867, the latter was domiciled in Roxbury, which is now part of Suffolk County. In the next month the widow and her son William removed to Barnstable, where she lived until she died. But whether she ever changed her domicil to that county, and, if so, when she did so, is not stated. The respondent was appointed guardian of William C., whether before or after the removal to Barnstable is not stated, but we presume before the widow's change of domicil, if she did change it. The guardian never changed William's domicil, but always intended that he should return to Boston. *Kirkland v. Whately*, 4 Allen, 462, 464. On these facts, we do not perceive how we could say that William's domicil was ever changed from Roxbury, or, Roxbury having been part of Suffolk County since 1868 (St. 1867, c. 359), how we could decide that the proceedings instituted in 1880 were void for want of jurisdiction. St. 1867, c. 359, § 3. *Harding v. Weld*, 128 Mass. 587. Pub. Sts. c. 156, § 2.

But, however this may be, it is now too late to contest the jurisdiction on the ground of the residence of William C. Hodgdon. The time for appealing from the decree assuming jurisdiction and appointing the administrator has gone by, and the statute does not allow the objection to be taken except by appeal. Pub. Sts. c. 156, § 4. See Report of Commissioners on Rev. Sts. c. 83, § 11. The point has been decided in Maine upon a similar statute. *Record v. Howard*, 58 Maine, 225. See *Derome v. Vose*, 140 Mass. 575.

The suggestion in argument from the petitioner, that the proceedings in the Probate Court were procured by fraud, is wholly unwarranted by the facts agreed.

Decree of Probate Court reversed.

LYDIA J. FREEMAN vs. WILLIAM H. CARPENTER & others.

Suffolk. March 30, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Fraud — Creditor — Special Attachment — Injunction.

Equity will not restrain the prosecution of a statutory remedy, if the rights of the parties can be fairly tried and are fully protected under another provision of the statutes.

BILL IN EQUITY, alleging that the plaintiff, Lydia J. Freeman, wife of Edward A. Freeman, on April 23, 1887, purchased with her separate property a parcel of land in Malden; that, by a deed duly recorded, it was conveyed to her sole use, and since that time it had been enjoyed by her as her separate property; that on or about May 19, 1887, this parcel was attached on mesne process as the property of her husband on different writs in actions brought against him in the Superior Court by the defendants William H. Carpenter and Alphonse A. Bonn; that these defendants recovered judgments against him on July 20, 1887, upon which executions duly issued on July 22, 1887; that the executions were placed, for levy on such parcel, in the hands of the remaining defendant, a deputy sheriff, by whom advertisement for the sale of the land was about to be or had been made; and praying for an injunction and further relief. The defendants filed separate answers, alleging that the attachment was made in pursuance of the Pub. Sts. c. 161, § 66, on the ground that the land was purchased and paid for by Edward A. Freeman, and conveyed to the plaintiff with the intent to defeat, delay, and defraud his creditors, and demurring to the bill on the ground that the plaintiff had a plain, adequate, and complete remedy at law.

In the Superior Court the demurrers were overruled; and the defendants appealed to this court.

E. B. Goodsell, for the defendant.

L. C. Southard, for the plaintiff.

MORTON, C. J. This is a bill in equity to enjoin the defendants from levying upon the plaintiff's land executions which

issued upon judgments against her husband. The defendants attached the land under the Pub. Sts. c. 161, § 66, as land of the husband which had been fraudulently conveyed to the plaintiff.

The statutes provide that any land of a debtor which has been fraudulently conveyed by him, or of which the record title has been conveyed to a third person, for the purpose of defrauding his creditors, may be taken on execution, and that, where land thus fraudulently held is levied on, the judgment creditor, or the purchaser at the sale, must within one year after the return day of the execution commence his suit to recover possession of the land, or the levy will be void. Pub. Sts. c. 172, §§ 1, 49.

This bill seeks to restrain the defendants from pursuing the remedy thus clearly given to them by the statutes. It alleges no peculiar circumstances which make this remedy unjust or inequitable as applied to this case. If this bill can be maintained, then in every case where a judgment creditor avails himself of the statute remedy the trial of the case may be transferred from a court of law to a court of equity. It is uniformly held that a court of equity will not issue an injunction to stay proceedings at law where the case can be fully and fairly tried at law. *Fuller v. Cadwell*, 6 Allen, 503. *Payson v. Lamson*, 134 Mass. 593.

In the case at bar all the issues raised by the plaintiff can be fully and fairly tried in the proceedings at law provided by the statute. Her rights are thus fully protected. The decree of the Superior Court must be reversed, and the demurrers of the defendants sustained.

Demurrers sustained.

ERASTUS BARTLETT & others vs. ABBIE L. C. HOUDLETTE.

Middlesex. April 3, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Executor — Devise and Legacy — Residuary Clause.

A bequest "to each of my nephews, one and all," will include those already given specific legacies under the will.

A testator, after giving various legacies, provided, in the final clause of his will, that "if in settling my estate there should not be money enough to pay the legatees what I have willed them, then pay one and all *pro rata* each, or if otherwise, the same *pro rata*." *Held*, that a surplus in the estate was to be divided among the legatees *pro rata* according to their legacies.

The executors were ordered to prepare and fence a cemetery lot, and to deposit funds the interest of which only was to be expended by a contemplated corporation in repairs thereon, and in addition were directed not to pay any legacies till the debts and the expense of fencing were paid and the deposits were made. *Held*, that the cemetery corporation was not a legatee within the meaning of the final clause of the will.

BILL IN EQUITY, filed October 20, 1887, by Erastus Bartlett, Thomas H. Lord, and Joseph E. Burt, executors under the will of Warren R. Houdlette, against Abbie L. C. Houdlette and nineteen other heirs at law and next of kin of the testator, for instructions as to the disposition of the residue of his estate.

The bill alleged that Warren R. Houdlette made a will, dated November 9, 1882, which, after reciting the gift of legacies to various relatives, including two of his nephews, contained the following provisions, which alone are material:

"7th. I give to each of my nephews, one and all, one hundred dollars each.

"8th. I now come to the last though the most interesting part of the disposition of my property of which I wish and request my executors to carry out to the letter, it is this, I have a cemetery of about eight acres called Forest Hill Cemetery located in Dresden, Lincoln County, State of Maine, my native town where my ancestors and many others are buried which I have been for some time engaged in fencing and putting in order but is not yet completed, three sides are fenced but the south side is not fenced, I now request my executors to see that it is carried out

as I desire. [Here followed directions as to method of completing the fencing.] Then after the above is all completed I request my executors to place in bank, say, eight hundred dollars which shall be a permanent fund forever, the interest only to be used to keep the fences in good repair as it may be found necessary from time to time, also (\$600) six hundred dollars I request my executors to be deposited in the same manner as the other for a different purpose, the interest only to be used for keeping the cemetery grounds in good order perpetually. Now a corporation will have to be made and by a petition to the legislature of the State of Maine it can be done so readily, so that it can be managed by regular officers chosen by the lot holders, then through its treasurer and secretary they can draw any part of the interest money that may be needed for fences or for keeping the grounds in good order, only in giving an order of interest money it must be approved of as correct by at least two of the selectmen and town clerk of the town, otherwise an order must not be paid by the bank or banks that hold the money on deposit under any considerations whatever.

"9th. I request my executors to not pay out any money whatever for legacies until all the debts I leave behind are paid, also all the expenses for completing fences around the cemetery and for the money donated and placed in bank or banks for cemetery purposes whatever.

"10th. I request the executors as all the property I have is in houses and building lots, that they will not make any unnecessary sacrifice to close it up too quickly, thereby saving as much as possible to the legatees.

"11th. Now if in settling up my estate there should not be money enough to pay the legatees what I have willed them, then pay one and all *pro rata* each, or if otherwise, the same *pro rata*."

The bill also alleged, that the testator died on May 30, 1883, and that the will was duly admitted to probate on September 25, 1883; that the plaintiffs were duly appointed executors under the will; and that, after the payment of debts, charges of administration, and legacies, there would remain in their hands as executors over \$10,000, the proceeds of a duly authorized sale of the real estate.

The prayer of the bill was that the plaintiffs might be instructed as to whether the two nephews were each entitled to receive one hundred dollars under the seventh clause of the will, in addition to the other legacies given them; as to what persons were entitled to the residue of the estate; and as to whether the trustees of the cemetery were entitled to any portion of such residue.

The answers admitted the allegations of the bill.

Hearing on the bill and answers before *W. Allen, J.*, who reserved the case for the consideration of the full court.

J. W. Spaulding (of Maine), for the two nephews and a niece.

J. H. Flint, for certain other nephews.

L. W. Howes, for a sister and certain nieces.

MORTON, C. J. The plaintiffs in their bill present two questions, one as to the construction of the seventh clause in the will, and the other as to the construction of the eleventh clause.

The seventh clause is as follows: "I give to each of my nephews, one and all, one hundred dollars each." There seems to be little room for doubt as to the meaning of this clause. The language clearly includes all his nephews. The fact that he had in the previous parts of the will given legacies to two of his nephews, furnishes no reason for cutting down his language and excluding them from the provisions of this clause, which clearly includes them. We can see no indication that the testator did not intend that, according to the clear import of his language, the nephews to whom legacies had previously been given should receive under this clause one hundred dollars equally with his other nephews. *Cushing v. Burrell*, 137 Mass. 21.

The eleventh clause is as follows: "Now if in settling up my estate there should not be money enough to pay the legatees what I have willed them, then pay one and all *pro rata* each, or if otherwise, the same *pro rata*."

This is carelessly and loosely drawn, but it is not difficult to discover what was the purpose and intention of the testator. And in such case the court will supply words and mould the language of the will for the purpose of carrying out the intention of the testator. *Metcalf v. Framingham Parish*, 128 Mass. 370. The first part of the clause clearly provides, that, in case

of a deficiency in the estate, so that all the legatees cannot be paid in full, their legacies shall abate *pro rata*; he then adds, "if otherwise," that is, if instead of there being a deficiency there is a surplus, "the same *pro rata*." He clearly means to pay the same *pro rata* to the legatees named in this clause. The testator apparently intended to dispose of all his property; and we can see no other meaning of the language he used for a purpose except the one we have given it.

The further question is raised whether any part of the surplus or residuum of the estate should be paid to the cemetery corporation referred to in the eighth clause of the will. It seems to us clear that the testator did not intend to include the cemetery corporation in the provisions of the eleventh clause. They were not in his mind legatees within the meaning of that clause. In the eighth clause he does not give a direct legacy; he orders his executors to fence and otherwise prepare a cemetery lot, and to deposit in some bank eight hundred dollars, of which the interest was to be used to keep the fences in repair, and also six hundred dollars, of which the interest was to be used in keeping the grounds in order. The ninth clause provides that the executors shall "not pay out any money whatever for legacies until all the debts I leave behind are paid, also all the expenses for completing fences around the cemetery and for the money donated and placed in bank or banks for cemetery purposes whatever."

This shows clearly that the gift for cemetery purposes was to be preferred to legacies, and was not to abate *pro rata*, under the first provision of the eleventh clause. It appears reasonably clear, that the testator did not consider the gift for the benefit of the cemetery as a legacy, or that those who managed the money donated were legatees within the meaning of the eleventh clause, who were to be entitled to a share of the surplus if there was any. The residuum should be divided among all the legatees named in the will, not including the cemetery corporation, *pro rata* according to the amounts of their legacies.

Decree accordingly.

COMMONWEALTH vs. HENRY T. PURDY.

Norfolk. April 2, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Intoxicating Liquors — Common Nuisance — Trial Justice — Jurisdiction —
Motion to Quash — Evidence — Admission.*

A trial justice has final jurisdiction under the Pub. Sts. c. 155, § 53, of the offence of keeping and maintaining a common nuisance under the Pub. Sts. c. 101, §§ 6, 7.

A motion, on an appeal in the Superior Court, to quash a complaint to a trial justice for formal defects only, is filed too late.

At the trial of a complaint for keeping and maintaining such a nuisance, evidence that the defendant promised the complainant, three or four months before the time alleged, that he would not sell any more liquor if the complainant would go no further with another complaint then pending, was admitted, on the ground that it appeared that the defendant occupied the premises described in the complaint before and since the date of the alleged promise. *Held*, that the admission, if any, implied from the promise not to sell any more liquor, did not warrant a presumption that the illegal selling continued, and that the evidence was inadmissible.

COMPLAINT under the Pub. Sts. c. 101, §§ 6, 7, by Timothy Ide, dated June 20, 1887, to Nathan A. Cook, a trial justice for the county of Norfolk, alleging that the defendant, at Medway, from November 1, 1886, to June 12, 1887, "did keep a certain building, to wit, a certain dwelling-house, a saloon being kept therein, the same being a place of public resort, the premises being kept by the said Henry T. Purdy for the illegal sale and illegal keeping of intoxicating liquors, and so the complainant saith that said Henry T. Purdy did then and there maintain a common nuisance."

In the Superior Court, on appeal from a sentence by the trial justice to a fine and imprisonment in the house of correction, the defendant, for the first time, moved to quash the complaint, for the following reasons: 1. Because no jurisdiction was legally conferred on the trial justice, from whose judgment and sentence the appeal in this case was taken, to take final jurisdiction of said complaint, and to try and pass sentence on said defendant for the offence therein set forth, and so this court hath no

jurisdiction of said complaint on appeal. 2. Because it is not alleged in said complaint that the building therein mentioned was used for the illegal keeping or sale of intoxicating liquors. 3. Because the place is not alleged with sufficient certainty. *Pitman, J.*, overruled the motion.

At the trial, the complainant was called as a witness by the government, and testified that in July, 1886, he had a conversation with the defendant, in which the defendant told him that, if he would go no further with a complaint then pending against him for the violation of the law relating to intoxicating liquors, he, the defendant, would not sell any more. The defendant seasonably objected to this evidence, but, it appearing that the defendant occupied the premises mentioned in the complaint on trial before and since the date of the conversation, the judge admitted the evidence. The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. D. Ely & C. G. Keyes, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

HOLMES, J. This was a complaint under the Pub. Sts. c. 101, §§ 6, 7. The trial justice had final jurisdiction by the express words of the Pub. Sts. c. 155, § 53. The objections raised by the motion to quash are merely formal. No doubt the technically correct allegation would have been that the premises were used for the illegal sale, etc. of intoxicating liquors. *Commonwealth v. Carolin*, 2 Allen, 169. *Commonwealth v. Welsh*, 1 Allen, 1. But the allegation that they were "kept" for those purposes indicated the offence intended to be charged with sufficient practical certainty to secure the defendant from injustice, and to throw upon him the burden of taking the objection before judgment was rendered by the trial justice. Pub. Sts. c. 214, § 25.

The evidence of the conversation with Ide, between three and four months before the offence charged, was not admitted to prove that the defendant occupied the premises, (*Commonwealth v. McNeff*, 145 Mass. 406, 410,) because the bill of exceptions states that it was admitted on the ground that it appeared that the defendant did occupy them. If then we assume that the conversation related to sales in the building referred to in the complaint, still, standing by itself, it would not warrant a pre-

sumption or inference that subsequently, at the time laid in the complaint, the building was used for the purpose of illegal sales. The defendant did not express an intent to sell, as in *Commonwealth v. Davenport*, 2 Allen, 299, but, on the contrary, made a conditional promise to stop selling. It is true that such a promise may be construed to admit by implication that the premises are then used for the illegal purpose; but, for all that appears, the condition of the promise was performed, and the promise kept. An admission which is only implied from a promise not to do so any more, does not warrant a presumption that the speaker continued in his illegal course. *Exceptions sustained.*

FLAX POND WATER COMPANY vs. CITY OF LYNN.

Suffolk. January 30, 1888. — May 5, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Tax — Real Estate — Abatement — Easement — Cloud upon Title — Water Company.

A water company acquired title in and to the waters of a pond, and to a permanent dam and sluiceway connected therewith, and took possession thereof. *Held*, that, even if the title was to an easement only, a tax was properly assessed to it for the dam and sluiceway as real estate, and that its sole remedy for any excess was by an application for an abatement.

BILL IN EQUITY, filed November 20, 1884, to remove a cloud from the plaintiff's title. The case was heard on the pleadings, before C. Allen, J., who reported it for the consideration of the full court, and was as follows.

On June 9, 1876, Stephen H. Tarbell and others conveyed to the plaintiff, by a deed duly recorded, "all our right, title, interest, and estate in and to the waters of Flax Pond, Sluice Pond, and all the tributaries to the same, and all the dams, sluices, and water-ways connected therewith, situated and being in the town of Lynn, county of Essex, and State of Massachusetts, meaning and intending hereby to convey unto the said

Flax Pond Water Company all the title to said waters, water rights, dams, and sluices, and all the waters flowing out of said Flax Pond through its natural channel or brook to the sea, which we derived through sundry intermediate conveyances from the grants of said waters made by the town of Lynn to one Edward Tomlins in the years 1633 and 1634, and also any and all rights to said water, water rights, dams, and sluices which we have acquired in any other way." Flax Pond is a natural pond, at the outlet of which, at the time the plaintiff acquired title, was a permanent dam some eight or nine rods long, built of stone, gravel, and earth, for mill purposes, and a permanent stone sluiceway, the length of which did not appear.

In the year 1876, and annually thereafter, a tax was assessed by the defendant's assessors to the plaintiff upon its interest in the pond and tributaries, describing it as real estate; and in 1877, 1880, and 1882, the defendant's collector, by deeds duly recorded, sold and conveyed to the defendant, for the non-payment of such taxes assessed for the years 1876, 1879, and 1881, "the following described real estate, viz. a reservoir of water with the dams connected therewith and the land under the same, commonly known as Flax Pond," and "about fifty acres under Flax Pond." The plaintiff contended that the deeds to the defendant constituted a cloud upon its title, and on or about September 20, 1883, made a sufficient demand upon the defendant to release to it the apparent title so obtained from the collector, but the defendant refused so to do. The bill alleged that the plaintiff did not, by the deed to it of June 9, 1876, or by any subsequent purchase, acquire the title to any real estate, but only the right to the waters flowing into and from the ponds and tributaries, which had remained in the same condition as when purchased, and that it had made no erections thereon.

C. S. Lincoln, for the plaintiff.

J. W. Berry, for the defendant.

C. ALLEN, J. The plaintiff took its deed in 1876, covering all the grantor's right, title, and interest in and to the waters of the pond, and all the dams, sluices, and water-ways connected therewith. It is to be assumed that it took possession thereof, as it now claims under the deed, and seeks to remove a cloud from its title. Being in possession, the tax upon the dam was

properly assessed to the plaintiff as a tax upon real estate. If, as the plaintiff avers, it never acquired the title to any real estate connected with the waters of the pond, and does not claim the fee in any real estate connected with said waters, these facts are immaterial so far as the right of taxation is concerned. It is the policy of the legislation of the Commonwealth that all valuable property shall be taxable in some form. The exercise of the right to erect and maintain dams, sluiceways, and other structures upon the land of another, may involve a large expenditure of money for such structures, and clearly the valuable property thus created should be taxable to somebody. If taxable, it must be either in connection with the fee of the land or independently of it.

Without now considering the question whether a valuable easement in gross may not be taxable by itself alone, we are of opinion that the plaintiff in the present case had an interest which was taxable to it as real estate, or in connection with the fee of the land, under the provisions of the statutes. Real estate, for the purpose of taxation, includes all lands, and all buildings and other things erected on or affixed to the same. Pub. Sts. c. 11, § 3. Gen. Sts. c. 11, § 3. This language is clearly broad enough to include the dam and sluiceway, which are certainly "things erected on or affixed" to the land. *Pingree v. County Commissioners*, 102 Mass. 76, 79. Taxes on real estate may be assessed to the person who is either the owner or in possession thereof. Pub. Sts. c. 11, § 13. Gen. Sts. c. 11, § 13.

Assuming that the plaintiff's title was only to an easement, as the plaintiff contends, still one who is entitled to an easement of this character, including a right to maintain a permanent dam and sluiceway, and who is in the enjoyment of this right, and who asserts and seeks to vindicate the same, is to be deemed as in possession of the real estate for the purpose of taxation, within the meaning of the statute. It is true, that, in a certain sense, the owner of the fee may be said also to have a possession; he might dig underneath the surface for mines, and do other acts not inconsistent with the right of the plaintiff. But the principal and practical possession of the surface of the land was with the plaintiff, and this was sufficient to fall within the meaning of

the statute as to taxation. As the value of the structures might far exceed the value of the fee subject to the easement, it is plain to see that it might be more proper and just to assess the tax to the plaintiff rather than to the owner of the fee of the soil, provided this was allowable under the statute. Being thus in possession, for the purposes mentioned, the plaintiff might properly be taxed for the dam and sluiceway as real estate, with the land itself. The assessors were not obliged to inquire into the details of the title, but might assess the whole value of the land thus occupied to the person maintaining and exercising such an easement, or to the owner of the soil. See *Milligan v. Drury*, 130 Mass. 428; *Flanders v. Cross*, 10 Cush. 514. The plaintiff was therefore properly assessed for the dam as real estate; and being properly assessed for a certain interest in real estate, the plaintiff's sole remedy for any excess was by an application for an abatement. *Salmond v. Hanover*, 13 Allen, 119.

The plaintiff, however, contends that its right or interest was not subject to taxation, under the decisions in *Cheshire v. County Commissioners*, 118 Mass. 386, and *Fall River v. County Commissioners*, 125 Mass. 567. But neither of those decisions affects the question before us. In the first case, the St. of 1872, c. 306, relating to the taxation of reservoirs, was held to be void, on the ground that it provided a standard of valuation which was not proportional and reasonable. In the second case, the reservoir company did not own the dam, nor any of the land covered by the pond, and the decision was that the mere right to flow land could not be taxed independently.

Without considering other grounds of objection, the present bill in equity, for the reasons stated, cannot be maintained.

Bill dismissed.

OLD COLONY RAILROAD COMPANY vs. GEORGE D. TRIPP.

Plymouth. October 18, 1887. — May 5, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES,
& KNOWLTON, JJ.*Railroad — Passenger — Baggage — Expressman — Hackman — Station
Grounds — Exclusive Privilege.*

A railroad corporation may contract with one to furnish the means to carry incoming passengers or their baggage and merchandise from its stations, and may grant to him the exclusive right there to solicit the patronage of such passengers; and such an agreement is not within the Pub. Sts. c. 112, § 188, which provides that such a corporation "shall give to all persons or companies reasonable and equal terms, facilities, and accommodations . . . for the use of its depot and other buildings and grounds." MORTON, C. J., FIELD & DEVENS, JJ., dissenting.

TORT for obstructing the station grounds of the plaintiff at Brockton. At the trial in the Superior Court, before *Thompson, J.*, evidence was introduced tending to prove the following facts.

The plaintiff is a railroad corporation, with all the powers and subject to all the duties of such corporations in this Commonwealth, and Brockton is one of the largest stations upon its road. It had been the practice of the defendant and other owners of job wagons, for several years prior to August 1, 1886, to go to the Brockton station to wait for trains, and to ascertain if the passengers had any baggage or other merchandise for them to carry. The plaintiff, on or about August, 1886, made a contract with the firm of Porter and Sons, of Brockton, to provide means for carrying all baggage and merchandise brought by incoming passengers to such places in the city as they might desire, at their expense. Afterwards, the plaintiff, through its station-master at Brockton, and by the order of its general manager and also of its division superintendent, but not by any by-law or vote of its directors or stockholders, notified the defendant and all other owners of job wagons not to come upon the plaintiff's grounds at Brockton to solicit baggage or merchandise from incoming passengers, and informed them of the contract made with Porter and Sons, but allowed them, however, to come to the station to deliver such baggage and merchandise, and to take

away such as they might have previous orders for. The defendant after receiving this notice continued to come upon the premises, and to solicit baggage and merchandise upon the platform of the station from passengers upon the arrival of trains, and refused to depart therefrom when requested by the plaintiff's agents, though not there to deliver baggage or merchandise for outgoing passengers, or to take it away upon orders received elsewhere.

Upon these facts, the judge ordered a verdict for the plaintiff, and reported the case for the determination of this court. If the verdict was correct, judgment was to be rendered thereon; otherwise, judgment was to be entered for the defendant.

The case was argued at the bar in October, 1887, and afterwards was submitted on the briefs to all the judges.

J. M. Day & H. Kingman, for the defendant.

J. H. Benton, Jr. & C. W. Sumner, for the plaintiff.

W. ALLEN, J. Whatever implied license the defendant may have had to enter the plaintiff's close had been revoked by the regulations made by the plaintiff for the management of its business and the use of its property in its business. The defendant entered under a claim of right, and can justify his entry only by showing a right superior to that of the plaintiff. The plaintiff has all the rights of an owner in possession, except such as are inconsistent with the public use for which it holds its franchise; that is, with its duties as a common carrier of persons and merchandise. As concerns the case at bar, the plaintiff is obliged to be a common carrier of passengers. It is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provided its depot for the use of persons who were transported on its cars to or from the station, and holds it for that use, and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is maintained. It can subject the use to rules and regulations, but by statute, if not by common law, the regulations must be such as to secure reasonable and equal use of the premises to all having such right to use them. See Pub. Sts. c. 112, § 188. *Fitchburg Railroad v. Gage*, 12 Gray, 393. *Spofford v. Boston & Maine Railroad*, 128 Mass. 326. The station was a passenger station. Passengers

taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it.

The defendant was allowed to use the depot for any business that he had with the plaintiff. But he had no business to transact with the plaintiff. He had no merchandise or baggage to deliver to the plaintiff, or to receive from it. His purpose was to use the depot as a place for soliciting contracts with incoming passengers for the transportation of their baggage. The railroad company may be under obligation to the passenger to see that he has reasonable facilities for procuring transportation for himself and his baggage from the station where his transit ends. What conveniences shall be furnished to passengers within the station for that purpose, is a matter wholly between them and the company. The defendant is a stranger both to the plaintiff and to its passengers, and can claim no rights against the plaintiff to the use of its station, either in his own right or in the right of passengers. The fact that he is willing to assume relations with any passenger which will give him relations with the plaintiff involving the right to use the depot, does not establish such relations or such right; and the right of passengers to be solicited by drivers of hacks and job wagons is not such as to give to all such drivers a right to occupy the platforms and depots of railroads. If such right exists, it exists, under the statute, equally for all, and railroad companies are obliged to admit to their depots, not only persons having business there to deliver or receive passengers or merchandise, but all persons seeking such business, and to furnish reasonable and equal facilities and conveniences for all such.

The only case we have seen which seems to lend any countenance to the position that a railroad company has no right to exclude persons from occupying its depots for the purpose of soliciting the patronage of passengers, is *Markham v. Brown*, 8

N. H. 523, in which it was held that an innholder had no right to exclude from his inn a stage-driver who entered it to solicit guests to patronize his stage, in opposition to a driver of a rival line, who had been admitted for a like purpose. It was said to rest upon the right of the passengers, rather than that of the driver. However it may be with a guest at an inn, we do not think that passengers in a railroad depot have such possession of or right in the premises as will give to carriers of baggage, soliciting their patronage, an implied license to enter, irrevocable by the railroad company. *Barney v. Oyster Bay & Huntington Steamboat Co.* 67 N. Y. 301, and *Jencks v. Coleman*, 2 Sumner, 221, are cases directly in point. See also *Commonwealth v. Power*, 7 Met. 596, and *Harris v. Stevens*, 31 Vt. 79.

It is argued that the statute gave to the defendant the same right to enter upon and use the buildings and platforms of the plaintiff, which the plaintiff gave to Porter and Sons. The plaintiff made a contract with Porter and Sons to do all the service required by incoming passengers in receiving from the plaintiff and delivering in the town baggage and merchandise brought by them, and prohibited the defendant and all other owners of job wagons from entering the station for the purpose of soliciting from passengers the carriage of their baggage and merchandise, but allowed them to enter for the purpose of delivering baggage or merchandise, or of receiving any for which they had orders. Section 188 of the Pub. Sts. c. 112, is in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and for the use of its depot and other buildings and grounds; and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." A penalty is prescribed in § 191 for violations of the statute.

The statute, in providing that a railroad corporation shall give to all persons equal facilities for the use of its depots, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad

company with equal conveniences. The statute applies only to relations between railroads as common carriers and their patrons. It does not enact that a license given by a railroad company to a stranger shall be a license to all the world. If a railroad company allows a person to sell refreshments or newspapers in its depots, or to cultivate flowers on its station grounds, the statute does not extend the same right to all persons. If a railroad company, for the convenience of its passengers, allows a baggage expressman to travel in its cars to solicit the carriage of the baggage of passengers, or to keep a stand in its depots for receiving orders from passengers, the statute does not require it to furnish equal facilities and conveniences to all persons. The fact that the defendant, as the owner of a job wagon, is a common carrier, gives him no special right under the statute; it only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them.

The English railway and canal traffic act, 17 & 18 Vict. c. 31, requires every railway and canal company to afford all reasonable facilities for traffic, and provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." *Marriott v. London & South Western Railway*, 1 C. B. (N. S.) 499, was under this statute. The complaint was that the omnibus of Marriott in which he brought passengers to the railroad was excluded by the railway company from its station grounds, when other omnibuses which brought passengers were admitted. An injunction was ordered. *Beadell v. Eastern Counties Railway*, 2 C. B. (N. S.) 509, was a complaint under the statute, that the railway company refused to allow the complainant to ply for passengers at its station, it having granted the exclusive right of taking up passengers within the station to one Clark. The respondent allowed the complainant's cabs to enter the station for the purpose of putting down passengers, and then required him to leave the yard. An injunction was refused. One ground on which the case was distinguished from Marriott's was, that the complainant was allowed to enter the yard to set down passengers, and was only prohibited from remaining to ply for passengers. See also *Painter v. London, Brighton, & South Coast*

Railway, 2 C. B. (N. S.) 702; *Barker v. Midland Railway*, 18 C. B. 46. Besides Marriott's case, *ubi supra*, *Palmer v. London, Brighton, & South Coast Railway*, L. R. 6 C. P. 194, and *Parkinson v. Great Western Railway*, L. R. 6 C. P. 554, are cases in which injunctions were granted under the statute; in the former case, for refusing to admit vans containing goods to the station yard for delivery to the railway company for transportation by it; in the latter case for refusing to deliver at the station, to a carrier authorized to receive them, goods which had been transported on the railroad.

We have not been referred to any decision or dictum in England or in this country, that a common carrier of passengers and their baggage to and from a railroad station has any right, without the consent of the railroad company, to use the grounds, buildings, and platforms of the station for the purpose of soliciting the patronage of passengers, or that a regulation of the company which allows such use by particular persons, and denies it to others, violates any right of the latter. Cases at common law or under statutes to determine whether railroad companies in particular instances gave equal terms and facilities to different parties to whom they furnished transportation, and with whom they dealt as common carriers, have no bearing on the case at bar. The defendant in his business of solicitor of the patronage of passengers held no relations with the plaintiff as a common carrier, and had no right to use its station grounds and buildings. A majority of the court are of the opinion that there should be

*Judgment on the verdict.**

* A similar decision was made the same day, in Suffolk, in the case of
COMMONWEALTH vs. JOHN CAREY.

COMPLAINT under the Pub. Sts. c. 112, § 196, to the Municipal Court of the city of Boston, alleging that the defendant did, on December 8, 1887, without right, loiter and remain within the passenger station-house of the New York and New England Railroad Company in Boston. At the trial in the Superior Court, on appeal, before *Sherman, J.*, it appeared in evidence that the defendant was a licensed hackman in the city of Boston; that on the day alleged he visited the premises in question about nine o'clock in the evening; that he drove into the enclosure owned by the company, permitted his hack to remain near the platform within the enclosure, and remained himself upon the platform and inside the station-house; that a railroad police officer in the station-house, who had been instructed not to permit any

FIELD, J. The Chief Justice, Mr. Justice Devens, and myself think that our statutes should receive a different construction from that given to them by a majority of the court. The Pub. Sts. c. 112, § 188, provide that "every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and for the use of its depot and other buildings and grounds; and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." Section 189 of the same chapter provides that "every railroad corporation shall promptly forward merchandise consigned or directed to be sent over another road connecting with its road, according to the directions contained thereon or accompanying the same, and shall not receive and forward over its road merchandise consigned, ordered, or expressly directed to be received and forwarded by a different route." By § 191, a railroad corporation which violates these provisions is liable for all damages sustained by reason of such violation, and to a penalty of two hundred dollars, which may be recovered to the use of the party aggrieved, or to the use of the Commonwealth. These sections are taken from the St. of 1874, c. 372, §§ 188, 189, 141, and the St. of 1880, c. 258.

Section 188 of the Pub. Sts. c. 112, was first enacted by the

back to enter the enclosure, except such as were owned by or in the service of the Boston Cab Company, requested the defendant, who was not in such service, to leave the premises of the company; and that the defendant refused and failed so to do, but remained upon the premises and inside the station for some minutes after being so requested to leave.

The judge instructed the jury that the defendant, upon the above facts, was upon the premises of the company without right, after he received the request to leave; and that if he remained and loitered thereafter, they would be authorized to return a verdict of guilty; and the defendant alleged exceptions.

The case was submitted on briefs, on April 6, 1888, to all the judges.

J. P. Leahy, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

W. ALLEN, J. The only exception taken was to the instruction that the defendant had no right to remain on the premises of the railroad company after being requested to leave. The recent case of *Old Colony Railroad v. Tripp*, *supra*, is decisive of the question. *Exceptions overruled.*

St. of 1867, c. 839. This section does not, in terms, require that the persons or companies to whom the corporation is required to give "reasonable and equal terms, facilities, and accommodations" shall own the merchandise which is transported, nor is it limited to the delivery of merchandise to be transported by the railroad corporation. In the clause relating to connecting railroads, the section plainly means that railroads shall give to other railroads connecting with them, and shall receive from such other railroads, reasonable and equal terms and facilities of interchange, both in delivering passengers and merchandise to, and in receiving them from, the railroads with which they connect. The provision that every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the use of the depot and other buildings and grounds, must include the use of the depot and other buildings and grounds for receiving passengers and merchandise from a railroad at the terminus where the transportation on the railroad ends, as well as for delivering passengers and merchandise to a railroad at the terminus where such transportation begins.

As the last clause of the section makes provision for carriers connecting by railroad, we think that the preceding clause was intended to make provision for other connecting carriers, and to include public or common carriers, as well as private carriers actually employed by passengers or by the owners or consignees of merchandise. Stages and expresses are the only common carriers of passengers and of merchandise to and from many places in the Commonwealth, and in connection with railroads often form a continuous line of transportation. The statute, we think, was intended to prevent unjust discrimination by a railroad corporation between common carriers connecting with it in any manner, and to require that the railroad corporation should furnish to such carriers reasonable and equal terms, facilities, and accommodations in the use of its depot and other buildings and grounds for the interchange of traffic.

A railroad corporation can make reasonable rules and regulations concerning the use of its depot and other buildings and grounds, and can exclude all persons therefrom who have no business with the railroad, and it can probably prohibit all

persons from soliciting business for themselves on its premises. Whatever may be its right to exclude all common carriers of passengers or of merchandise from its depots and grounds who have not an order to enter, given by persons who are or who intend to become passengers, or who own or are entitled to the possession of merchandise which has been or is to be transported, it cannot arbitrarily admit to its depot and grounds one common carrier and exclude all others. The effect of such a regulation would be to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public. Such a regulation does not give "to all persons or companies reasonable and equal terms, facilities, and accommodations . . . for the use of its depot and other buildings and grounds," in the transportation of persons and property. See *Parkinson v. Great Western Railway*, L. R. 6 C. P. 554; *Palmer v. London, Brighton, & South Coast Railway*, L. R. 6 C. P. 194; *New England Express Co. v. Maine Central Railroad*, 57 Maine, 188.

Marriott v. London & South Western Railway, 1 C. B. (N. S.) 499, was an application for an injunction under the St. of 17 & 18 Vict. c. 31, § 2, and an injunction was issued compelling the company to admit the complainant's omnibuses into its yard "at all reasonable times, for the purpose of forwarding, receiving, and delivering traffic upon and from their said railway, and in the same manner and to the same extent as other public vehicles of a similar description are admitted into the said yard for that purpose." In that case the company had made arrangements with one Williams, to provide sufficient accommodations by means of omnibuses for passengers over a part of the route on which the complainant's omnibuses ran, but it appeared that there were passengers from Twickenham and Hampton Wick whose sole reliance was upon the complainant's omnibuses. Williams's omnibuses were admitted within the yard to set down and to receive passengers, but the complainant's omnibuses were not permitted to enter the yard for either purpose. The court held, that, as it did not appear that there was any public benefit which justified the course pursued by the company, the arrange-

ment with Williams was an "undue and unreasonable preference and advantage" in his favor, within the meaning of the statute.

Beadell v. Eastern Counties Railway, 2 C. B. (N. S.) 509, and *Painter v. London, Brighton, & South Coast Railway*, 2 C. B. (N. S.) 702, were both applications under the same statute. In one of these cases the railway company had agreed with a cab proprietor, in consideration of £600, to allow him the exclusive liberty of plying for hire within its station; and in the other, similar exclusive privileges had been granted to a limited number of cab proprietors. The application of a cab proprietor to be admitted on equal terms was refused in each case, on the ground that it was not shown that the arrangement made by the companies was not beneficial to the public, and it was said that "the statute in question was passed for the benefit of the public, and not for that of individuals."

The later English cases we have cited seem to show that, under the English statute, the public convenience or inconvenience is not exclusively the test, but is only one element to be taken into account in considering what is an undue and unreasonable preference, and that a common carrier may be regarded as representing all those persons who choose to employ him. While the English statute provides against undue and unreasonable preferences and advantages, it does not, in terms, provide that all persons and companies shall have equal facilities and accommodations for the use of the depot and other buildings and grounds of a railroad corporation. The statute relating to expressmen, construed in *New England Express Co. v. Maine Central Railroad*, *ubi supra*, is in this respect similar in terms to the Pub. Sts. c. 112, § 188.

It is, undoubtedly, a convenience to passengers on a railroad, that common carriers of passengers or of baggage and other merchandise should be in waiting on the arrival of trains at a station, although no order requiring the attendance of such carriers has been previously given. While the statute requiring a railroad corporation to give to all persons and companies reasonable and equal terms, facilities, and accommodations for the use of its depot and other buildings and grounds, must, from the nature of the subject, be so construed as to permit the corporation to make

such reasonable regulations as are necessary to enable it to perform, without inconvenience, its duties as a common carrier, and such as the size and condition of its depot and other buildings and grounds require, yet the facts stated in the report cannot be held sufficient to warrant the plaintiff in admitting one company of expressmen to, and excluding all others from, the advantages of bringing express wagons within its grounds, and of accepting or of soliciting employment as a common carrier of baggage from the passengers arriving at its depot. The report does not show that any inconvenience to the railroad company, or to the public using the railroad, was occasioned by the defendant's entering the grounds of the company for the purpose of soliciting employment as a common carrier of baggage. Upon the facts as they appear in the report, it cannot be said that, within any reasonable construction of the statute, reasonable and equal facilities were granted to the defendant and to Porter and Sons, or that any necessity existed for giving a preference to the latter.

In *Hole v. Digby*, 27 W. R. 884, it was held that, if a railway company licensed one person to ply with carriages within its station yard, a person not so licensed commits a trespass in entering the yard, against the prohibition of the company, although the license given was an undue preference within the meaning of the St. 17 & 18 Vict. c. 31, § 2. See *Barker v. Midland Railway*, 18 C. B. 46. That statute, in § 3, authorized an application to the Court of Common Pleas, or to a judge of that court, by any person complaining of a violation of the act, and authorized the court, or judge, to issue a writ of injunction, restraining the company from continuing to violate the act, and in case of disobedience by the company authorized the court, or judge, to issue a writ of attachment, and to direct the payment of a sum of money, not exceeding £200, for every day during which, after a day to be named, the company failed to obey the injunction; and by § 6 it was provided that "no proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided," saving, however, all rights under existing laws. By the St. of 36 & 37 Vict. c. 48, § 6, the jurisdiction given to the Court of Common Pleas was transferred to railway commissioners. The ground of the

decision in *Hole v. Digby* is, that the sole remedy of a person aggrieved by the action of the railway company is by an application to the railway commissioners.

The remedies provided by our statutes (Pub. Sta. c. 112, § 191) are an action for damages, and also an action of tort for a penalty, which may be recovered by the party aggrieved to his own use. If, then, the railroad company, upon the facts appearing in the report, had no right absolutely to exclude the defendant, as a common carrier, from entering its depot and grounds to solicit employment from passengers, while it permitted Porter and Sons to enter for this purpose, and if it would be liable to the defendant in an action, for excluding him, the defendant could not be guilty of a tort in entering for this purpose in a reasonable manner and at reasonable times.



MARCELLUS S. AYER & another *vs.* R. W. BELL MANUFACTURING COMPANY.

Suffolk. March 7, 1888. — May 5, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Contract in Writing — Extrinsic Evidence — Collateral Agreement — Agent's Authority — Evidence.

A written order for goods, signed by the buyer only, set forth the kind of goods and the price agreed upon, and contained stipulations as to rebates. *Held*, that evidence of a collateral oral agreement by the seller to advertise the goods was admissible.

In an action for the breach of such an agreement, there was evidence that the seller, a soap manufacturer, was introducing a new brand by extensive advertising, as was customary, and by the offer of gifts to the largest consumers, to be distributed on a certain day; that the seller sent an agent to the buyer, a wholesale firm, in answer to a letter inquiring "what the terms and inducements are to jobbers"; that the agent, when told that the buyer would not purchase a certain quantity unless the seller would advertise, promised to keep up the advertising; that shortly afterwards the seller, in letters to another firm, to which the same agent had sold soap, wrote that "the advertising, etc., as he agreed" would be attended to, and that a person had been sent "to do the advertising" as agreed; that the agent admitted that he made the agreement with that firm without prior authority, but stated that he made it subject to the

seller's approval. *Held*, that there was evidence to go to the jury, that the agent had authority to make agreements to advertise.

Evidence that a person, to whom the manufacturer sold out his business, advertised after the day for drawing the gifts, and after the alleged breach, was *held* inadmissible.

CONTRACT to recover for a breach of a warranty of quality of certain soap sold by the defendant to the plaintiffs, and of a promise to advertise it. Writ dated July 12, 1886. At the trial in the Superior Court, before *Blodgett, J.*, there was evidence tending to prove the following facts.

The plaintiffs, who did business under the name of M. S. Ayer and Company, were wholesale grocers in Boston, and the defendant was a soap manufacturer in Buffalo, New York. In February and March, 1886, the defendant extensively advertised in various newspapers in Boston and vicinity, as well as by the use of circulars and pamphlets, a brand of soap called the French Villa Soap, which was comparatively new to the New England market. These advertisements, besides commending the quality of this brand of soap, recited lists of gifts of various kinds that were to be distributed by the defendant on October 30, 1886, to those consumers who meanwhile should use the largest quantity of soap, and should prove that fact by returning to the defendant certificates properly filled out, a blank for which was placed in the wrapper around each cake of the soap.

On March 5, 1886, the plaintiffs sent to the defendant the following letter, signed by them :

"Boston, March 5, 1886. R. W. Bell Manufacturing Co., Buffalo: Gentlemen, Noticing your advertisement in this vicinity on French Villa Soap, we write to know what the terms and inducements are to jobbers. Please furnish us such information, at the same time state if you are able to make prompt shipments."

On March 6, 1886, one Breyfogle, who was in the employment of the defendant, was directed by a telegram from it to call upon the plaintiffs, and, having done so, sold to them two hundred and fifty boxes of the French Villa Soap, whereupon the plaintiffs signed and delivered to him the following order written upon a printed form furnished by Breyfogle :

"Special inducement for the introduction of French Villa Soap, which will not be duplicated. Boston, March 6, 1886. R. W. Bell Manufacturing Co.: Gentlemen, Please send 250 boxes French Villa Soap, at \$7.25 per box, less freight and 50 cents per box rebate, payable quarterly. That there shall be no further claim made or allowed on this sale of French Villa Soap, and that the same shall be promptly paid for at the expiration of the time on which it was sold. If sold less than \$7.25, we forfeit rebate. Terms: 60 days' acceptance, or less 2 per cent discount on sharp cash. If they reduce the price, they will all [allow] the reduction on all goods on hand at that time."

The soap thus ordered was subsequently received by the plaintiffs, and paid for by them on or about March 30, 1886, but they declined to pay for further lots ordered by them, on the ground that the defendant had not fulfilled its alleged contract to advertise the soap.

Evidence was also introduced tending to show that advertising in the soap trade was done universally by the manufacturers, and not by the jobbers; that such advertising was necessary to introduce a new brand of soap successfully; and that the advertisements of the defendant made in Boston and vicinity relating to the French Villa Soap were almost entirely discontinued early in 1886.

One of the plaintiffs was permitted to testify, against the objection of the defendant, to prove its alleged agreement to advertise the soap, that, in the conversation with Breyfogle when the above order was given, he told Breyfogle that the plaintiffs would not think of buying such a quantity of the soap "unless we were sure they would advertise it liberally, not only in the Boston papers, but in the local papers which would reach consumers, because the sale would have to come from consumers direct"; that Breyfogle replied, that "they were going to advertise it more liberally than any soap put on the market"; that in mentioning other brands of soap of which the plaintiffs had made large sales because of liberal advertising in local papers, he told Breyfogle that the French Villa Soap would have to be advertised the same as the other brands of soap referred to, and that Breyfogle in reply said that the soap would be "advertised

in that way"; and that Breyfogle said further, "We are not only going to advertise as I have told you, but we are going to hire a store, a front, on Washington Street, one of the most conspicuous places we can get, and keep on exhibition there a sample of everything that is to be given away, for instance, the organs, the pianos, and the diamonds and silver ware, and it will be advertised and will be there on exhibition, a front on Washington Street, where the public will understand they can go and see the goods, and we shall keep it before the people constantly until the time when the gifts are to come off," on October 30, 1886.

The witness, in reply to the question, "Have you stated whether he said anything about the demand that he would create by advertising?" said that Breyfogle told him that the plaintiffs would not only "want that quantity, but they should advertise so that we should want at least twenty-five hundred boxes before the drawing should come off, not only the two hundred and fifty boxes, when I spoke of its being a considerable quantity, and he repeated that idea two or three different times, and then added that what he had done in other States he knew he could do here in Massachusetts, New Hampshire, and Maine"; and in answer to the question, "Have you stated what he stated about keeping up the advertising any length of time?" said that Breyfogle told him that the advertising would be kept up "continuously until the drawings should come off, the next October, continuously before the public by advertising these circulars and handbills daily throughout the State, also the other States which he was afterward to canvass in the same way."

The same witness also testified, that, after the plaintiffs wrote to the defendant declining to pay for the further lots ordered, Breyfogle called upon them in order to effect a settlement, and wished to know what the trouble was; that he told Breyfogle that the defendant "had not advertised it in any respect as he agreed upon doing," and that "we have sent soap on your representations that it should be advertised," no customer having bought a second box of it; that Breyfogle said "they were going to advertise it, but were going to do it their way"; that Breyfogle, in reply to the assertion by the witness, "But you agreed to advertise it continuously," said, "Well, we are going to advertise, and are going to do it in our way; and in the course

of a month or six weeks"; and that Breyfogle, in reply to the further suggestion made to him by the witness, "You have not advertised as you agreed to at first, how do we know you are going to do it?" replied, "Our men are at work advertising the soap."

Breyfogle, who was called as a witness by the plaintiffs, testified that he had no connection with the advertising branch of the defendant's business; that he had no authority to bind the defendant by a contract to advertise, and that he did not in fact make such a contract; that under a special arrangement he had sold to the firm of Twitchell, Champlin, and Company, of Portland, Maine, who were to have the exclusive right of sale in that State, excepting Bangor, five hundred boxes of the soap, the defendant to do the advertising in all towns from five thousand up; that this arrangement was made by him expressly subject to the approval of the defendant, to whom he afterwards reported it, and who wrote him that it had accepted the proposition, and complied with his order.

The plaintiffs were allowed, against the defendant's objection, to introduce in evidence two letters from the defendant to Twitchell, Champlin, and Company, the first of which, dated March 19, 1886, after mentioning that the order for the five hundred boxes had been received from Breyfogle, recited that "the advertising, etc., as he agreed, will also be properly attended to"; and the second of which, dated April 17, 1886, set forth that the defendant had "sent a man to your State to do the advertising, in accordance with the agreement made by Mr. Breyfogle, and he is doing it now."

The defendant offered to show that the World Manufacturing Company, to whom it sold its entire interest in the French Villa Soap, on or about May 1, 1886, continued the advertising after October 30, 1886, but the court excluded the evidence.

The plaintiffs were permitted, against the defendant's objection, to introduce evidence to prove a warranty that Breyfogle stated to the plaintiffs that the soap was of "good quality," and that it was of the "best quality of laundry soap, and better than any laundry soap in the market."

The defendant asked the judge to instruct the jury, that there was no evidence to warrant the finding of authority in Breyfogle

to make the alleged contract to advertise; that there was no evidence from which they could find any contract to advertise, since the order given by the plaintiffs to the defendant showed no such contract, and that Breyfogle had no authority merely as selling agent of the defendant to bind them by any contract to advertise; and that the plaintiffs cannot recover on such a contract unless the jury is satisfied that Breyfogle had express authority which would authorize him to make the contract declared on.

The judge gave the request as to the authority of selling agents, but refused to give the other instructions asked for, and instructed the jury, among other things, on the question of Breyfogle's authority to bind the defendant by an agreement to advertise the soap, that, when the defendant received from the plaintiffs their letter of inquiry of March 5, 1886, "This defendant might have replied by letter, stating what the inducements were; it did not choose to do so; it sent a man to answer this letter. It was impossible for the plaintiffs to know what his instructions were from his principal, or what authority he had. Having trusted to him to make the statement as to what the inducements and terms were, the defendant is bound by it. I say it is bound by it, speaking generally. Undoubtedly it might be true that, under circumstances like these, the agent might have made some promise so extravagant and unnatural, so foreign and repugnant to ordinary business methods and usages, that the defendant would not be held by it. But in view of the admitted facts, that this advertising had gone on for some days, that this was a new soap so far as this market was concerned, that there is evidence tending to show that the manufacturer advertises the soap and not the jobber, and evidence tending to show that to introduce a new soap and secure a successful sale for the soap, it is necessary to advertise extensively and systematically, it cannot be said, as matter of law, that the promise to continue this advertising was one of those extravagant and unreasonable promises which the agent could not make, and by which the principal would not be bound. And so I say to you, that if you find the facts as to the receipt of the letter by the defendant, the direction to Breyfogle to call, that Breyfogle did call, and you are satisfied upon the evidence that it is the usual practice for the

manufacturer to advertise the soap, that it is necessary to advertise a new soap, in connection with the admitted facts, that there had been this advertising before the 6th of March, and that it was a new soap so far as this market is concerned, you may well find that Breyfogle was authorized to make this promise."

The judge further instructed the jury as to the sale by Breyfogle to Twitchell, Champlin, and Company, that "Breyfogle says that whatever promise there was, as to advertising the soap in the State of Maine, was a conditional promise, and that it was a matter to be submitted to his employer, the defendant corporation, in Buffalo, and if they were willing to assent to it, then the advertising was to be done. If that is the promise that Mr. Breyfogle made, if it was conditioned on the approval of the defendant, then the evidence is of no importance on the question of Breyfogle's authority to make the promise to the plaintiffs upon which the plaintiffs rely. But, on the other hand, if you are satisfied that Breyfogle made an unconditional promise to advertise this soap, and the defendant recognized that, and promised to advertise, it is some evidence tending to show that Breyfogle had something more than the ordinary authority of a salesman, and that he had authority to make a promise such as the plaintiffs say was made in this case."

The judge also instructed the jury as to the alleged warranty that the statements by Breyfogle did not constitute a warranty, and submitted the case to the jury solely upon the issue as to the alleged agreement to advertise. The jury returned a verdict for the plaintiffs; and both the plaintiffs and the defendant alleged exceptions.

J. B. Warner & H. E. Warner, for the defendant.

G. Putnam & J. Fox, for the plaintiffs, stated that, if the defendant's exceptions should be overruled, the plaintiffs would waive their exceptions.

HOLMES, J. 1. The plaintiffs' written order for soap was drawn to bind them only, was signed only by them, and does not contemplate the defendant's signing it. There was no necessity that it should set forth the whole consideration, especially collateral undertakings, on the part of the defendant. It purports to state what the plaintiffs agree to buy, and the price which they agree to pay. The stipulation for a reduction on

goods on hand, if the defendant should reduce the price, relates to the price. The provision in favor of the seller, "that there shall be no further claim made or allowed on this sale of French Villa Soap, and that the same shall be promptly paid for," etc., refers to claims for a rebate based upon some complaint as to the thing sold. Evidence of a collateral oral undertaking by the defendant to advertise was admissible. See *Hazard v. Loring*, 10 Cush. 267. *Erskine v. Adeane*, L. R. 8 Ch. 756. *Morgan v. Griffith*, L. R. 6 Ex. 70. *Lindley v. Lacey*, 17 C. B. (N. S.) 578. *Eighmie v. Taylor*, 98 N. Y. 288.

2. There was some evidence that the plaintiffs said that they would not buy the quantity purchased unless they were sure that the defendant would advertise the soap liberally in Boston and local papers, and that the defendant's agent, Breyfogle, promised to keep up advertisements of the soap until October 30, on which day the various gifts promised in the advertisements were to be distributed. The defendant denies its agent's authority to make the promise; but we are of opinion that there was evidence to go to the jury. The agent was sent by the defendant to the plaintiffs in answer to a letter inquiring "what the terms and inducements are to jobbers." It appears on the face of the printed form produced by Breyfogle, upon which the plaintiffs wrote their order, that the offer of some sort of special inducement was contemplated. It was important to the success of the plaintiffs in selling the soap, that the advertisements should be kept up until the date for distributing the gifts, which were promised to the consumers of the largest amounts. It is usual for the manufacturers to do the advertising, and the defendant was doing it at the time of the agreement. Therefore, an undertaking by the defendant to continue what it was doing, and what parties in its situation usually do, was, or might have been found to be, a natural inducement to a wholesale purchaser, and one which the plaintiffs reasonably might assume to be within Breyfogle's authority to offer, when he was sent to answer their inquiries.

There was also evidence that, later in the same month, the defendant, in a letter to another firm with whom Breyfogle had made a contract, wrote, "The advertising, etc., as he agreed, will also be properly attended to," and afterwards wrote that a

man had been sent "to do the advertising in accordance with the agreement made by Mr. Breyfogle." Breyfogle in his testimony impliedly admitted that he made this agreement without previous authority, but stated that he made it subject to the defendant's approval. The jury may have believed the admission, and at the same time may have disbelieved the qualifying statement on the strength of the letters, which, on their face, seem to import, not ratification, but the recognition of an agreement already made and binding. *Case v. Baldwin*, 136 Mass. 90, 91. If the jury took this view, the letters were evidence that contracts to advertise were within the scope of Breyfogle's general authority. See *Lovell v. Williams*, 125 Mass. 439. *Reed v. Ashburnham Railroad*, 120 Mass. 48. They were instructed that, if the agreement was conditional, the evidence was of no importance on this question.

It was suggested that the judge ruled that the defendant was bound by Breyfogle's acts as matter of law; but looking at the whole charge rather than at one isolated expression, we think that the jury must have understood that the question was left to them.

3. Evidence that another company to which the defendant sold out its business did advertise after the day for distributing the promised gifts to purchasers had gone by, when the time covered by the defendant's alleged contract had expired, and the breach was complete, was properly excluded.

The plaintiff's exceptions are waived.

Exceptions overruled.

GEORGE H. BRADFORD & another *vs.* CUNARD STEAMSHIP COMPANY.

Suffolk. March 8, 1888. — May 5, 1888.

Present : MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Carrier — Damages — Evidence — Hearsay — Appraiser's Report.

The report of an appraiser, since deceased, to an insurer, as to the damage to goods while in the hands of a carrier by sea, is inadmissible in an action by the owner against the carrier to recover damages therefor.

The goods were six cases of woollen dress goods, invoiced at \$3,510.11, and all the contents of three, worth not less than \$1,600, and varying proportions of them in the other three, were damaged by salt water and soda ash. *Held*, that a jury would be warranted in finding, as a matter of common experience, that damage of such a nature to such goods could not be less than \$500.

CONTRACT to recover for damage to six cases of woollen dress goods while being carried in the defendant's steamship *Samaria*.

Trial in the Superior Court, without a jury, before *Pitman, J.*, who reported the case for the determination of this court, in substance as follows.

The defendant did not deny its liability to the plaintiffs for such damages as they might prove by competent evidence. An auditor, to whom the case was referred, and whose findings of fact, it was agreed, should be final, reported the following facts.

The invoice value of the goods, to which the plaintiffs' claim was limited by the bill of lading, was \$3,510.11. The goods were more or less damaged by salt water and soda ash, all the goods in three of the cases being injured, and a varying proportion of them in the other three cases. The goods were insured against sea perils by an insurance company, which settled the plaintiffs' claim for damages immediately after the arrival of the goods by the payment of \$1,533.55, as for a partial loss. At the time of this settlement the plaintiffs made a verbal agreement with the company to aid it in recovering against the defendant, and the action was brought in the plaintiffs' name for its benefit. The damaged goods were subsequently sold by the plaintiffs, who did not preserve any evidence which might bear upon the question of damages.

The auditor admitted in evidence, against the objection of the defendant, a written report to the insurance company by an appraiser, since deceased, who had been in its employ for the survey and appraisal of losses for about eleven years, and who was ordered by the company to survey and estimate the damage to the plaintiffs' goods. The report was made in the regular course of his employment, and purported to estimate the percentage of damage to the invoice value of the injured goods. It was made by him after a personal examination of the goods, and was accepted as correct by the insurance company, which at once paid the plaintiffs in settlement \$1,533.55. The auditor, relying upon the appraiser's report alone, found and reported that the plaintiffs were entitled to recover the sum of \$1,345.45, with interest from the date of the writ.

The defendant requested the judge to rule that the appraiser's report was inadmissible in evidence, and that there was in the auditor's report no admissible evidence of the amount of damage, and that the plaintiffs could recover only nominal damages. The judge ruled that the appraiser's report was inadmissible; that there was, however, in the facts reported by the auditor, evidence sufficient to authorize a finding of substantial damages, and found for the plaintiffs in the sum of \$500.

If there was admissible evidence in the facts reported by the auditor sufficient to support the finding, and the ruling excluding the appraiser's report was right, then judgment was to be entered for the plaintiffs upon the finding for \$500, with interest; if the judge erred in excluding the appraiser's report, then judgment was to be entered on the auditor's report; if the judge was correct in the ruling excluding the appraiser's report, and erred in ruling that there was evidence sufficient to support a finding of damage to the amount of \$500, then the verdict was to be set aside, and judgment was to be entered for the plaintiffs for the sum of one dollar.

F. Dodge, for the plaintiffs.

G. Putnam & T. Russell, for the defendant.

HOLMES, J. 1. If the plaintiffs had no better evidence of the amount of damage suffered by their goods than the report of an appraiser who settled the sum to be paid by the insurers, the want of it was due, not to the nature and necessities of the

case, but to their own neglect. The report would not have been admissible if the appraiser had been alive, and could have been called as a witness. *Kafer v. Harlow*, 5 Allen, 348. *Adams v. Wheeler*, 97 Mass. 67. *Leighton v. Brown*, 98 Mass. 515. In our opinion, the fact that he was dead did not make it so. Assuming for the purposes of the case that the report was in other respects within the exception to the rule against hearsay, and that it would have been admissible to prove that the appraiser did estimate the damage, if that fact had been material, (*Kennedy v. Doyle*, 10 Allen, 161; *Polini v. Gray*, 12 Ch. D. 411,) or even to prove what his estimate was, his estimate, however proved, was not admissible to show the amount of damage.

No doubt the actual amount of damage expressed in dollars is theoretically certain, and is a fact. But it is a fact which neither can be observed directly by the senses, when the only question is of the honesty of the observer who makes the entry, nor can be deduced from the facts directly observed by simple mathematical computation, without assuming other facts not the subject of direct observation. *Walker v. Curtis*, 116 Mass. 98. What a particular man will think the amount of damage may differ widely from the actual amount, and, as experience shows, is likely to differ from the opinion of others, because it will depend not only upon what he sees, but upon a number of other facts which he arrives at by inexact and undisclosed methods. An opinion upon such a question, however honestly formed and by however competent a man, is too remote from the indisputable data of the senses to be admitted without being subjected to cross-examination. See *Wright v. Tatham*, 4 Bing. N. C. 489, 508, 528; *Abel v. Fitch*, 20 Conn. 90, 96.

- 2. The goods were dress goods. It appears that all the contents of three cases, worth not less than sixteen hundred dollars, and varying proportions of them in three other cases, were damaged by salt water and soda ash. We cannot say that a jury would not be warranted in finding, as a matter of common experience, that damage of such a nature to such goods could not be less than five hundred dollars, or somewhat under a third of the value of those goods which were all soaked with the alkali.

Judgment for the plaintiffs for five hundred dollars.

ALFRED S. BROWN vs. CUNARD STEAMSHIP COMPANY.

Suffolk. March 8, 1888. — May 5, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Common Carrier — Bill of Lading — Limit of Liability — Damages.

If a bill of lading limits a carrier's liability to the invoice value of the goods in the event of loss through his fault, damages in such case are to be computed in the usual way up to that value, irrespective of the market value of the goods as damaged at the port of destination.

CONTRACT to recover for damage to certain packages of walnuts belonging to the plaintiff, while being carried in the defendant's steamship Samaria. Trial in the Superior Court, without a jury, before *Pitman, J.*, who reported the case for the determination of this court, in substance as follows.

The walnuts were shipped by the plaintiff, to be transported to Boston by the defendant, under a bill of lading which contained the following clause: "Ship not accountable for any sum exceeding £100 per package, for goods of whatever description, unless the Value is Declared and Freight as may be agreed paid thereon; and in event of loss or damage, for which the Ship is responsible, the liability shall not exceed the Invoice or the Declared Value for the United States Customs Duty." An auditor, to whom the case was referred, under an agreement that his findings of fact should be final, reported that the walnuts were damaged by water admitted into the compartment in which they were stored by the breaking of a rubber joint in a pipe passing through the compartment; that the breaking of the joint was owing to the defective condition of the pipe and joint existing at the commencement of the voyage, and that this was a non-fulfilment of the defendant's implied warranty that the ship at that time was fit for the performance of the voyage and the transportation of the goods; that the walnuts suffered damage in their market value in Boston to the amount of \$151.78, which amount was considerably less than their invoice value; and that it did not appear in evidence that the market value of the goods in their damaged condition was less than their invoice value with costs of importation added.

Upon the facts found by the auditor, the defendant did not contest its liability for damage, except upon the ground that, according to the bill of lading, its liability was limited to the invoice value of the goods, and asked the judge to rule that no damage was shown for which it could be held responsible according to the bill of lading. The plaintiff asked the judge to rule that, upon the facts, he was entitled to recover \$151.78; but the judge refused so to rule, and found for the defendant.

If upon the facts the plaintiff was entitled to recover, judgment was to be entered for \$151.78, with interest; otherwise, judgment was to be entered for the defendant.

F. Dodge, for the plaintiff.

G. Putnam & T. Russell, for the defendant.

HOLMES, J. The plaintiff's goods were damaged on the defendant's vessel, through its fault, to the amount of one hundred and fifty-one dollars and seventy-eight cents, in their market value in Boston, the port of destination; but it did not appear that their market value as damaged was less than the invoice value of the sound goods with the cost of importation added. The bill of lading limits the defendant's liability to the invoice value. See *Graves v. Lake Shore & Michigan Southern Railroad*, 137 Mass. 33; *Hill v. Boston, Hoosac Tunnel, & Western Railroad*, 144 Mass. 284. The only question which we shall consider is whether the language used exempts the defendant from all liability upon these facts.

The defendant relies upon some decisions to the effect that a provision that the ship owner will not be liable for more than the invoice value of the goods is to be construed as limiting the liability in case of partial loss to the difference between the net proceeds of each article damaged and its invoice price and freight, and that if the cargo owner "has received from the sale of the damaged goods the invoice price, after deducting the cost of importation, sale, etc., the libel will be dismissed." *The Lydian Monarch*, 23 Fed. Rep. 298, 300. *Pearse v. Quebec Steam-Ship Co.* 24 Fed. Rep. 285, 289. We shall not criticise these decisions further than to say, that, if they are not distinguishable from the case at bar, we cannot follow them.

The bill of lading before us reads, "Ship not accountable for any sum exceeding £100 per package, for goods of whatever

description, unless the Value is Declared and Freight as may be agreed paid thereon, and in event of loss or damage for which the Ship is responsible, the liability shall not exceed the Invoice or the Declared Value for the United States Customs Duty." It is plain that these words fix alternative limits of liability, — £100 per package if the value is not declared, the declared value when it is declared. In the former case, we do not suppose that it would be contended that, if a package brought £100, no damage could be recovered; yet, unless the argument is carried to that extent, we see no reason why in the latter alternative the ship owners should escape if the goods bring their invoice price.

Looking at the words of the latter branch of the sentence alone, it will be seen that they refer to the event of "loss or damage for which the ship is responsible," and therefore in terms presuppose that something is to be recovered in the case for which they provide. The following words, "the liability shall not exceed," etc., are apt words to express the outside limit of the sum to be recovered; but both the particular words and the whole structure of the sentence are most inapt to express a stipulation that, if the goods are still equal to the invoice value, there shall be no recovery at all. Even in the case of a valued policy, which is much stronger than the one under consideration, the rule in most jurisdictions is to leave the valuation entirely on one side for the purpose of determining what proportion of the valuation is to be paid by the insurer upon a partial loss. *Irving v. Manning*, 1 H. L. Cas. 287, 306. *Lewis v. Rucker*, 2 Burr. 1167. *Bradlie v. Maryland Ins. Co.* 12 Pet. 378, 399. *Boardman v. Boston Ins. Co.* 146 Mass. 442.

As we read the contract, the damages are to be ascertained in the usual way, by finding the difference in value between each package as damaged and the same undamaged, and these damages are to be paid by the defendants up to but not exceeding £100 when the value is not declared, or, in this case, up to but not exceeding the invoice value. As the damage to the plaintiff's walnuts did not exceed the invoice value, the defendant must pay the whole amount.

Judgment for the plaintiff.

SEWALL AND DAY CORDAGE COMPANY *vs.* BOSTON WATER
POWER COMPANY & others.

DAVIS JOHNSON & others *vs.* SAME.

GEORGE BROOKS *vs.* SAME.

Suffolk. March 9, 12, 1888. — May 5, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Flats — Boundary — Low-water Mark — Accretion — Eminent Domain —
Adverse Possession.*

The title of an owner of upland in adjoining flats extends, under the Colony ordinance of 1647, where the tide ebbs and flows less than one hundred rods, to extreme low-water mark.

A writ of entry was brought in 1884. The demandant's predecessor in title had owned flats bounded upon a tidal stream, an arm of the full basin of the Boston Back Bay, which was a mere thread at extreme low water, and the tenant, who was the grantee of the right of the Commonwealth in the flats and channels of the full basin, claimed so much of the demanded premises as lay below mean low-water mark under the ordinance of 1647, and the rest by accretion. In 1820 the Mill Dam was built under a charter, flooded the premises at will, and caused the channel below the premises and above the dam to fill up so that a part of them was kept constantly under water, but no part was changed otherwise, and the sediment in the channel would not have kept back the water without the Mill Dam. *Held*, that the demandant owned to the thread of the stream, and that the tenant had no title by accretion or otherwise.

THREE WRITS OF ENTRY, dated June 14, 1884, to recover adjacent parcels of flats lying in the bed of Muddy River Creek, an arm of the full basin of the Back Bay in Boston.

The cases were tried together in the Superior Court, without a jury, before *Thompson, J.*, the only evidence introduced being the report of an auditor to whom the cases were referred. The evidence tended to show the following facts.

The demanded premises were situated between the thread of Muddy River Creek and the marsh on either side of the stream. The demandants in the first two cases were the owners, on the southerly side of the creek, of the upland and the flats thereto appurtenant, and the demandant in the third case was the owner, on the northerly side, of the upland, prior to its taking for park purposes by the city of Boston, and of the flats thereto

appurtenant. The first-named tenant was the successor of the Boston and Roxbury Mill Corporation, and together with the other tenants, who were its trustees under a deed of trust from it, had, under an indenture from the Commonwealth dated December 27, 1856, "all the right, title, and interest of the said Commonwealth in and to the soil, freehold of the flats, and channel in the full basin."

Prior to 1820, Muddy River, a fresh-water stream which had a large flow in the winter and spring, and dwindled to a mere thread during several months in the year, ran unobstructed to the Charles River, and the tide ebbed and flowed therein above the demanded premises. The lowest point of the demanded premises was nearly half a foot below actual mean low-water mark and from two to three feet above extreme low-water mark, so that at mean low water the tide covered a strip twelve feet wide on either side of the thread of the stream, and at the extreme low water of the spring tides the premises would remain bare of water, except that flowing in the stream, for about an hour and a half. The entire width of the creek at the demanded premises at high water was about three hundred feet.

In 1820 the Boston and Roxbury Mill Corporation built the Mill Dam and the Cross Dam, which formed the full basin of the Back Bay, and constructed a sluiceway in the Mill Dam, replacing it when carried away, built with piers, a flooring, and gates, to receive the waters of the Charles River at flood tide, and to keep up the depth of water in the full basin at ebb tide. The full basin thereafter was kept constantly flowed, and the demanded premises were covered to the depth of about ten feet, until about 1865 or 1866, when the gates in the sluiceway in the Mill Dam were removed and were not replaced; but the foundation sill of the sluiceway, which projected about one foot and a half above mean low water and from three to four feet above extreme low water, was permitted to remain. Thenceforward the tide ebbed and flowed through the sluiceway, and stood at low water to the depth of about two feet upon the demanded premises.

In 1834 the Boston and Worcester Railroad was built across the full basin, with a pile bridge, which was from time to time reduced in length, for the passage of the water, and in 1876 the

sluiceway was partly filled with stones, by the order of the board of health of the city of Boston, to keep up the water in the full basin in the summer and prevent a nuisance. At some time prior to 1878, the full basin, by reason of these various obstructions, and by deposits of mud, sand, and other soft materials from the streams and from a sewer flowing into it, had become silted up in various places, so that the original channel of Muddy River, below the demanded premises, was filled to the depth of from a few inches to two feet above the original bottom. By the bar thus formed, the line of mean low water upon the demanded premises was gradually changed, until it stood and remained at an artificial low-water mark above mean low-water mark. After 1879, the Back Bay Park was laid out by the city of Boston, and so constructed as to cut off the ebb and flow of the tide from the demanded premises, and the sewer and the streams flowing into the full basin were diverted therefrom and made to flow elsewhere. If, however, the sill of the sluiceway had been removed and the bottom restored to its natural state, and if the flow of water into the full basin had not been thus diverted and the tide not thus cut off, the current of the stream and the action of the tide would have been sufficient to prevent the formation of the deposit in the channel, and to cut through the bar, and the water at the demanded premises would have resumed its original level.

The demandants contended that they owned the flats down to the original extreme low-water line, "or to the thread of the Muddy River," on either side thereof. The tenants contended that they owned, under their grant, either up to the artificial low-water mark, or to the "original mean low-water line," on either side of the thread of the stream.

Upon these facts, the judge found that the demandants were entitled to recover the whole of the demanded premises, and reported the case for the determination of this court.

H. D. Hyde & H. R. Bailey, for the tenants.

W. G. Russell & H. W. Putnam, for the demandants.

HOLMES, J. These are three writs of entry, brought to recover three adjacent parcels of flats, bounded by Muddy River Creek, an arm of the full basin of the Back Bay in Boston. The demandants are owners of the upland. The tenants are

grantees of all the right of the Commonwealth in the flats and channels in the full basin, by a deed dated December 27, 1856.

1. Portions of the premises lie between the original ordinary and extreme low-water marks. The tenants contend that these portions never belonged to the demandants' predecessors in title under the ordinance of 1647, and that the words of the ordinance, "shall have propriety to the low-water mark," should be construed as meaning to the ordinary low-water mark. But it has been settled for fifty years that they mean to extreme low-water mark. We cannot disturb a rule of property which has been acted on so long, on the strength of general reasoning. *Sparhawk v. Bullard*, 1 Met. 95. *Attorney General v. Boston Wharf Co.* 12 Gray, 553, 558. *Wonson v. Wonson*, 14 Allen, 71, 82. *Attorney General v. Woods*, 108 Mass. 436, 440.

2. Formerly, at the lowest spring tides, all the demanded premises were bare of water, except the fresh water running in Muddy River, a natural stream, which in its minimum flow was a mere thread. At that time, therefore, the title of the riparian owners extended to the thread of the stream or creek. *Boston v. Richardson*, 13 Allen, 146, 155; *S. C.* 105 Mass. 351, 355. It follows that the demandants are entitled to recover all the demanded premises, unless something has happened to deprive them of some part of what once belonged to their predecessors in title.

The tenants put their case on the doctrine of accretion, assuming as their starting point that the channel of Muddy River belonged to the Commonwealth and passed by the grant of 1856. Perhaps it might be a sufficient answer to say, as we just have said, that this first assumption is a mistake with regard to the channel upon the premises, and that therefore there was no land to which the supposed accretion could attach, the lower channel being cut off by the bar hereafter mentioned, on which the tenant relies. But we will consider the facts a little further.

In 1820 and 1821 the Mill Dam and Cross Dam were built, and in consequence of these dams, their gates and sill, the placing of stones in the sluiceway, and other obstructions, the channel between the premises and the dams had become more or less filled up with mud, etc. This sediment of mud, called

by the tenants a bar, in connection with the sill of the dam, established an artificial low-water mark, which encroached upon the premises above mean low-water mark. The tenants argue, that, while the sudden raising of the water by the artificial structures made no change in the title, the subsequent gradual filling of the channel above the structures did make a change, and that the case is one of the gradual encroachment of water in consequence of natural and artificial causes combined. But we do not interpret the report as disclosing such a case. It is found that the accumulations were not sufficient to act as a dam and to resist the water, or to prevent its resuming its natural level had the artificial obstructions been removed. A series of artificial structures cut off the natural flow of the water, and set it back. Of course such an interruption was followed in time by more or less filling up and settling of sediment above it; but, as we read the report, the cause of the whole change is to be found in the dams and their adjuncts.

Furthermore, no change has taken place in the locus. No part of it has been washed away. Its relation to low-water mark is unchanged. After the change, as before, it was still unaffected by the ebb and flow of the tide for an hour and a half at extreme low water. What the obstructions did was simply to leave behind an inland salt-water lake when the tide was out. As was observed by the demandants' counsel, this often happens on the sea-shore, but no one supposes that the low-water mark or the limits of private ownership are affected by the fact.

For the reasons stated, we are of opinion that the tenants have no title by accretion. They do not argue that the demandants' land was taken by the Boston and Roxbury Mill Corporation by the right of eminent domain, when that company built its dams and flooded the premises. *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467, 482. *Boston Water Power Co. v. Boston & Worcester Railroad*, 16 Pick. 512, 522; *S. C.* 23 Pick. 360, 394. *Lowell v. Boston*, 111 Mass. 454, 466. *Isele v. Arlington Savings Bank*, 135 Mass. 142, 143. Nor is it contended that the demandants have lost their fee by adverse possession. It does not appear that the first-named tenant or its predecessor in title has done more than it had a right to do

under its charter, or that the demandants have been disseised for twenty years, if at all. *Tremont Improvement Co. v. Boston Water Power Co.* 10 Allen, 261. *Eastern Railroad v. Allen*, 135 Mass. 13, 16. *Drake v. Curtis*, 1 Cush. 395, 416, 417. *Charles v. Monson & Brimfield Manuf. Co.* 17 Pick. 70, 77.

We do not discuss these questions at length, as the tenants do not seek to raise them. *Judgment affirmed.*

STEPHEN R. METCALFE vs. CUNARD STEAMSHIP COMPANY.

Suffolk. March 13, 1888. — May 5, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Personal Injuries — Invitation to enter Premises — Licensee — Trespasser.

A person, wishing to consult a surgeon, whom he erroneously supposed to be attached to a foreign steamship, about bringing his family to this country, went to her wharf on a day of the week other than that when only it was open to the public in the gatekeeper's discretion. Upon finding the gate open, he went in with a companion, without objection, and reached her deck by a freight gangway. There a supposed officer met them, who said, "Well, gentlemen," and who, after the reply, "Good day, please direct us to the doctor's cabin," pointed along a covered passageway, saying, "Go along that passage, and it is a little beyond the end of it." Thereupon he followed his companion along the passageway, and, as he was emerging therefrom, upon his companion saying, "Look at those fellows down there," he turned his head, and almost immediately was struck in the back and knocked into the hold by a bag of flour about to be lowered through an adjoining hatch, at which the vessel was being loaded. *Held*, that the plaintiff was a mere licensee, if not a trespasser, and that he could not recover of the owner of the vessel for the injuries thus sustained.

HOLMES, J. This is an action of tort for damages for personal injuries suffered by the plaintiff through falling into the hold of the defendant's steamship *Catalonia*. The case on the plaintiff's testimony was as follows. He wished to consult with Dr. Vincent, one of the defendant's surgeons, about bringing his family to this country. Dr. Vincent, when the plaintiff knew him, was on the *Samaria*, but had told the plaintiff that he hoped and expected to get exchanged to the *Catalonia*. He had not been exchanged to that vessel, however, and was not on board of her. The accident was on Tuesday or Wednesday.

The defendant's dock was not open to the public except on Fridays, and then only subject to the gate-keeper's discretion; but the plaintiff and his companion, one McNulty, found the gate open, and went in without objection. At the ship they found a freight gangway, up which they went. When on deck they met a man who, the witnesses thought, had on the uniform of an officer, and who said, "Well, gentlemen." Then the plaintiff answered, "Good day, please direct us to the doctor's cabin." The man pointed along a covered passageway, and said, "Go along that passage, and it is a little beyond the end of it." The way pointed out seems to have been the direct way to the doctor's cabin, although a more roundabout one would have taken them there, and would have avoided the danger. They went along the passageway. Near the end of it was an open hatch, at which the vessel was loading. McNulty was ahead, and said, "Look at those fellows down there." The plaintiff emerged from the passageway, turned his head, and almost immediately was struck in the back and knocked into the hold by a bag of flour which swung across the deck on its way to be lowered through the hatch.

We do not think that, upon a fair construction of these facts, the defendant can be said to have invited the plaintiff upon its premises, or to the place of danger. It could not be presumed by the jury that there was a general invitation to the public at all times, merely because the defendant was a carrier of passengers. The practice is well known to be otherwise with vessels, however large their carrying business. It is shown to have been otherwise on the part of the defendant. The plaintiff got upon the dock only by accident. On reaching the ship he did not find a passenger gangway, but entered by what he knew to be a freight gangway. There was no invitation in that. He did not meet the supposed officer until actually on board, and in speaking to him assumed to be there rightly. His inquiry for the doctor's cabin only called for an answer pointing it out. The answer only purported to point it out, and did not add an invitation to the plaintiff's already implied purpose to go there. Neither did it add any new authority to the plaintiff for remaining on the ship. It took for granted, as the circumstances warranted the speaker in taking for granted, that the plaintiff was

rightly there. The plaintiff at the highest was a mere licensee, and it is questionable whether he was not a trespasser. He had no business on board, or if his desire to meet Dr. Vincent be thought to have warranted his inquiring there, he had the opportunity to do so when he met the supposed officer, but he disregarded it. *Severy v. Nickerson*, 120 Mass. 306, 307.

Again, the open hatch and the loading which was going on were not a trap. The danger was perfectly manifest, and it would seem that the plaintiff would have avoided the injury if his attention had not been turned away by his companion. The defendant owed the plaintiff no duty to warn him against dangers of this sort. See *Zoebisch v. Tarbell*, 10 Allen, 385; *Larmore v. Crown Point Iron Co.* 101 N. Y. 391; *Vanderbeck v. Hendry*, 5 Vroom, 467; *Parker v. Portland Publishing Co.* 69 Maine, 173; *Bolch v. Smith*, 7 H. & N. 736; *Batchelor v. Fortescue*, 11 Q. B. D. 474.

Finally, there is no evidence that the loading was not being done in a perfectly proper manner, or that there was any negligence in the handling of the flour, as in *Corrigan v. Union Sugar Refinery*, 98 Mass. 577. See *McLean v. Burnham*, (Penn., Jan. 17, 1887,) 8 Atl. Rep. 25. The case differs in all or nearly all the particulars which we have enumerated from *Warren v. Fitchburg Railroad*, 8 Allen, 227, 231; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Wilton v. Middlesex Railroad*, 107 Mass. 108; *Learoyd v. Godfrey*, 138 Mass. 315; *Smith v. London & Saint Katharine Docks Co.* L. R. 3 C. P. 326; *White v. France*, 2 C. P. D. 308; and the other cases cited for the plaintiff.* The direction to the jury to return a verdict for the defendant was correct. *Judgment on the verdict.*

W. Gaston & C. F. Jenney, (*J. E. Cotter* with them,) for the plaintiff.

G. Putnam & W. L. Putnam, for the defendant.

* See *Heinlein v. Boston & Providence Railroad*, *post*, p. 136.

JOSEPH B. SANFORD vs. JOHN QUINN.

Suffolk. March 15, 1888. — May 5, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Poor Debtor — Examination — Magistrate — Jurisdiction — Adjournment —
Recognizance — Waiver.*

A magistrate, who adjourns a hearing upon an application to take the poor debtor's oath to a certain day, has no jurisdiction before that day to order a further adjournment, and if, having done so, neither he nor any other competent magistrate attends at the day first fixed, there is, in the absence of any waiver, a breach of the debtor's recognizance.

CONTRACT on a poor debtor's recognizance, entered into by David Lockhead as principal and by the defendant as surety. Trial in the Superior Court, without a jury, before *Thompson, J.*, who allowed a bill of exceptions, in substance as follows.

Lockhead, against whom judgment had been recovered by the plaintiff, and who was duly arrested on execution, gave notice of his desire to take the oath for the relief of poor debtors, and an examination was had before a master in chancery, who continued it until May 20, 1886, and again until June 2, 1886. On June 1, 1886, the magistrate, who intended to be absent on June 2, 1886, notified the plaintiff and Lockhead's attorney by a notice, which was received by the plaintiff on June 2, 1886, at about six minutes before nine o'clock A. M., that the examination was further continued until June 9, 1886, at nine o'clock A. M. The bill of exceptions recited, that "the record of said magistrate was made up on the first day of June, A. D. 1886, and showed said case continued until June 9, 1886"; but a copy of the record appended thereto set forth under the word "adjourned" the following entries only: "May 20th, '86, 9 A. M. June 2d, '86, 9 A. M. June 9th, '86, 9 A. M." On June 9, 1886, Lockhead appeared before the magistrate, and, as the plaintiff did not appear within the hour, took the oath for the relief of poor debtors, and was discharged from arrest.

The defendant asked the judge to rule that the plaintiff could not recover; but the judge refused so to rule, and ruled that the

magistrate had no authority on June 1, 1886, to continue the hearing until June 9, and found for the plaintiff. The defendant alleged exceptions.

O. A. Galvin, for the defendant.

R. Lund & J. B. Sanford, for the plaintiff.

C. ALLEN, J. The ruling of the court, to which exception was taken, was that the magistrate had no authority on the first day of June (that being the day before the day to which the case had been adjourned) to continue the case until the ninth day of June. No question was raised at the trial as to the construction of the magistrate's record, and no request was made to have it written out in full. The question before us must therefore now be considered as if the record showed an adjournment of the case to June 2d, and an order of the magistrate passed on June 1st for an adjournment from June 2d to June 9th, he not being present at all on June 2d. No injustice will be done to the parties by this assumption, since the counsel on both sides have argued the case on this basis only.

No decision has been pointed out to us, and we know of none, which in any way recognizes the doctrine that such a magistrate has jurisdiction to act except at fixed times. He may adjourn the case from time to time, and, if he fails to attend at the time and place fixed, any other competent magistrate may attend and continue the proceedings. Pub. Sts. c. 162, §§ 35, 67. Similar provisions exist respecting trial justices. Pub. Sts. c. 155, §§ 20, 21. But there are no statutory provisions respecting such magistrates analogous to that which now enacts that the Supreme Judicial Court and the Superior Court shall be always open in every county, and there shall no longer be any terms thereof. St. 1885, c. 384, § 2. The jurisdiction of the magistrate depended on his attendance at the time and place fixed, and he had no authority on the day before to pass any order in the case. There are numerous decisions which show that it is the duty of the debtor, at all hazards, to have a competent magistrate present at the time and place appointed for his examination. *Vinal v. Tuttle*, 144 Mass. 14, and cases cited. He failed to do so. There was no waiver on the part of the plaintiff. The result is that there was a breach of the recognizance.

Exceptions overruled.

GEORGE A. GODDARD vs. FRANCIS AMORY & others.

Suffolk. March 30, 1888. — May 5, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Devise and Legacy — Nephews and Nieces — Blood Relations.

A testatrix, in a will disclosing a general intention to dispose of the bulk of her property to relatives by blood, gave the income of a trust fund to "my nephews and nieces living at my decease," the fund to be divided at the death of the survivor of them "amongst the descendants of my nephews and nieces." At the date of the will and at the testatrix's death there were living two nephews, one of whom was married; the widow of a deceased nephew; and two brothers, aged sixty-six and sixty years respectively, the younger being married and his wife being sixty-four years of age. *Held*, that the bequest did not include wives of nephews.

BILL IN EQUITY, filed December 23, 1887, by the trustee under the will of Cornelia Loring, against a nephew and the wives, children, and grandchildren of deceased nephews of the testatrix, for instructions as to the disposition of a trust fund.

The bill alleged that Cornelia Loring made a will, dated October 5, 1874, which, after providing for the payment of small legacies to various persons, proceeded as follows:

"Fourteenth. I give to my brother-in-law Nathaniel Goddard the sum of three thousand dollars out of the property held by him for my benefit under the provisions of an indenture, dated June 29th, 1850, signed by him and by my late husband Charles G. Loring and myself.

"Fifteenth. I also give to said Nathaniel Goddard ten thousand dollars out of said property, in trust to invest the same and to pay over the net income thereof to Mary S. Fuller, wife of Henry W. Fuller, during her life, and upon her decease to pay over the principal to her daughters then living, share and share alike, the issue however of a deceased daughter to take a share; and I direct that no bond or sureties on his official bond shall be required of him, as such trustee, and the remainder of said property I give to my son George A. Goddard, or in the event of his decease in my lifetime leaving no wife or children, one half of said remainder to the heirs at law or next

of kin of his father at the time of the decease of said George, and the other half to the President and Fellows of Harvard College. In the event of the decease of my son in my lifetime leaving a wife or children, I give the income of the whole of said property to his wife for her life, and, subject only to said life estate in said income, I give the whole of said property to said children, or failing such children I direct that the same be divided as aforesaid. It is my will that none of the legacies given in the preceding clauses shall be paid out of the said property held by Nathaniel Goddard, but in case the available funds which I shall leave at my decease (other than those named in the first clause of this will) shall be insufficient for the payment of said legacies, I give and appropriate out of the income or principal of the residue of my father's estate now held in trust under the terms of his will whatever sums may be needed to pay said legacies.

"Sixteenth. I give from the rest and residue of my estate, or from what I have the power of appointment, ten thousand dollars to my son George A. Goddard in trust, to keep the same invested, and to pay so much of the net income therefrom during the lives of my nephews and nieces living at my decease and the survivor of them, to those or the issue of those that are most needy, at such times as he thinks best, he keeping invested any income not divided by him, and upon the death of the survivor to divide the principal and any accrued income amongst the descendants of my nephews and nieces who in his judgment may be most in need of the same. I authorize him by will or otherwise to appoint his successor in said trust. Said trustees to be exempted from giving bonds. I give to the said George A. Goddard all the rest and residue of my estate, together with my share of the principal of the residue of my father's estate now held in trust under his will, and my share of the income thereof during the lifetime of my brothers, subject to the provisions contained in the last preceding clause, and any other property of which I have the power of disposing by will: but in the event of my son's decease in my lifetime, leaving no wife or children, I give one half of said residue and other property to the heirs or next of kin of my son on his mother's side, and one half to the President and Fellows of Harvard College to be

applied by them to the education of young women in such way as may seem best to them. And in case of the decease of my son in my lifetime leaving a wife or children, I give the income of the whole of said residue and other property to his wife for her life, and, subject only to said life estate in said income, I give the whole of said residue and other property to said children, or failing such children I direct that the same be divided as aforesaid."

The bill also alleged that at the time of the execution of the will, and when it was admitted to probate, which it was agreed was on October 25, 1875, there were living the following persons, either relations by blood or connected by marriage with the testatrix: Francis Amory, a nephew; George K. Amory, a nephew, and Adelaide Amory, his wife; Ellen D. Amory, the widow of John L. Amory, a deceased nephew; an unmarried brother, aged about sixty-six years; and a married brother, who was about sixty years of age and whose wife was about sixty-four years of age.

The bill further alleged, that the wives of the nephews were not relatives by blood of the testatrix; that Adelaide Amory was divorced from George K. Amory in or about 1881; that George K. Amory had by her two children, who were minors, and both of whom were living; and that John L. Amory left several children by Ellen D. Amory, one of whom was a minor, and another of whom had several children, all of whom were minors; and that Adelaide Amory, if within the clause provided for in the sixteenth section of the will, was one to whom the trustee should from time to time make payments from the fund therein created.

The prayer of the bill was that the plaintiff might be instructed as to whether he had authority to pay any part of the income of the trust fund to Adelaide Amory or Ellen D. Amory.

The answer of Adelaide Amory and Ellen D. Amory admitted the allegations of the bill, and contended that they were nieces of the testatrix, and that the trustee had the right to pay to them portions of the trust fund or of the income.

The answers of the other defendants also admitted the allegations of the bill, but contended that Ellen D. Amory and

Adelaide Amory were not nieces of the testatrix, and were not included within the provisions of the sixteenth clause of the will, and that the trustee had no power to pay any portion of the fund or of its income to them.

Hearing on the bill and answers before *W. Allen, J.*, who reserved the case for the consideration of the full court.

W. I. Badger, for the plaintiff.

S. Lincoln, for Adelaide Amory and Ellen D. Amory.

W. H. Gudgel (of Indiana), for certain children of Ellen D. Amory.

G. P. Sanger, for certain other children and descendants of the nephews.

MORTON, C. J. By her will the testatrix gave ten thousand dollars to George A. Goddard, "in trust, to keep the same invested, and to pay so much of the net income therefrom during the lives of my nephews and nieces living at my decease and the survivor of them, to those or the issue of those that are most needy, at such times as he thinks best, he keeping invested any income not divided by him, and upon the death of the survivor to divide the principal and any accrued income amongst the descendants of my nephews and nieces who in his judgment may be most in need of the same."

At the date of the will and at the time of her death, the testatrix had two nephews, one of whom only was alleged to be married, and two brothers of the ages respectively of sixty-six and sixty years. Ellen D. Amory, the widow of John L. Amory, a deceased nephew of the testatrix, was then and is now living. The only question presented in this case is whether the wife of the living nephew and the widow of the deceased nephew are included within the terms "my nephews and nieces living at my decease." According to the modern usage, the word "niece" or "nieces" means the daughter or daughters of a brother or sister. It does not by its accepted meaning include the wives or widows of nephews. The bequest to "my nephews and nieces" should be construed according to its legal signification, unless it appears from the will that the testatrix intended to use it with a more extended meaning. It is argued that, as she left no nieces by blood, the word "nieces" cannot be satisfied unless she meant to include the wives of nephews.

But we think, looking at the whole will, that this was not her intention. She had two brothers, and it was possible that one of them might have a daughter or daughters born to him, in which event the use of the word "nieces" was necessary in order to insure an equality among her blood relations in equal degree. The will throughout shows a general intention to dispose of the bulk of her property to relatives by blood. In the clause we are considering, she intends to make provision for two generations, her nephews and nieces and their descendants. Upon the death of the survivor of the nephews and nieces, the principal of the fund is to be divided "amongst the descendants of my nephews and nieces." According to the construction claimed by the wives of the nephews, if a nephew dies or is divorced and his wife marries again and has children, the principal of the fund might go to such children, to the exclusion of the children of the nephews of the testatrix. We cannot doubt that this would defeat her purpose and intention. She intended to provide for the descendants of her nephews and nieces who were her relations by blood; and the words "and nieces" in this connection have some tendency to show that she had in her mind, not her nephews' wives, but a possible class of nieces by blood. We cannot believe that in this clause she intended to provide for the descendants of a widow or divorced wife of a nephew, who were strangers to her in blood and affection.

Taking the whole will together, we are of opinion that she intended to use the words "my nephews and nieces living at my decease" in their primary and natural sense, and therefore that the trustee has no right to pay any portion of the income of the fund to the wives or widow of the testatrix's nephews.

Decree accordingly.

COMMONWEALTH vs. FRANCIS L. WHITE.

Suffolk. April 2, 1888. — May 5, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

New Trial — Juror — Misconduct — Conversations — Law and Fact — Evidence.

If during the trial of an indictment improper remarks are made in the hearing of jurors, before and after they are impanelled and outside of the jury-room, the presiding judge is not required, as matter of law, to set aside the verdict.

Upon the hearing of a motion for a new trial, the testimony of jurors as to conversations between them, during the trial and outside of the jury-room, is inadmissible to impeach their verdict.

INDICTMENT. After the former decision, reported 145 Mass. 392, at a hearing in the Superior Court, before *Sherman, J.*, on a motion for a new trial on the ground that "some of the jurors were unduly influenced and expressed a decided opinion of the guilt and innocence of the defendant before the evidence on either side of the case was concluded, and before the arguments of counsel were made, and before the jury were charged on the law and facts of the case," evidence was offered in substance as follows.

One Ross testified that he was one of the jurors who tried the case against the defendant at the April term, 1887; that during the trial Daley, another juror, and himself went into a saloon on Hanover Street in Boston to get some refreshments, and talked about the trial; that the barkeeper asked if they were talking about the White case, and, upon an affirmative answer, added, "Well, I guess the fellow is guilty fast enough"; that, two or three days before the trial began, he heard the case talked about in the court-room; that it was said, but not to him, that the defendant had been tried before, and had secured a new trial by getting a false affidavit from a juror; that he talked with French, another juror, about the case on the second or third day of the trial, on their way to the court-house; that he suspected that French was favorably inclined to the defendant, and was disposed to hang the jury, regardless of the evidence; that he told French that they had better be careful, as the jurors

were being watched, that if he did hang the jury he would report him to the court, and that he believed that the defendant was guilty; that he had several talks with French outside of the court-house and before the evidence was concluded; that he had never been on a jury before, and thought he was doing his duty; that the presiding judge cautioned the jury not to talk about the case until the evidence was closed, nor allow other persons to talk to them about the case; and that he was troubled at the part he had taken, and in accordance with the advice of a friend, a member of the bar, he made an affidavit on August 23, 1887, reciting the above facts.

Daley testified that he was a member of the jury that tried the defendant; that one day he met Ross, while the case was being tried, and after the adjournment of the court; that they went into the saloon on Hanover Street, and each had some beer and refreshments; that while they were there Ross began talking about the case to him; and that he did not hear the bar-keeper make any remark about it.

French testified that he was one of the jurors who tried the defendant; that, a day or two before the trial commenced, he overheard a man saying that the defendant had tampered with the jury in a previous trial; that the remarks were not addressed to him, and he did not know who made them; that on the second day of the trial, after the jury were dismissed, and as he was passing out through the corridor of the court-house, he heard some one say, "There will be no disagreement of the jury in this case,—the damned fool had better have skipped to Canada, and not stay here thinking he could get out of it,—he can't doctor the jury as he did the jury" in the previous trial; that he did not know who made these remarks; that during the trial both the foreman of the jury and Ross said that the defendant was guilty; that during the trial Ross charged him with being a kicker and favorable to the defendant, and threatened to report him to the court and the officers if he voted for acquittal; and that during the trial the foreman said that the defendant was a damned rascal and should be convicted.

The judge ruled that the testimony of jurors as to conversations between them during the trial, whether in the court-room or out of court, was inadmissible to impeach their verdict, and excluded

their evidence on that subject; and that, as matter of law, the defendant was not entitled to a new trial, and in the exercise of his discretion declined to grant it; and, at the request of the defendant, reported the case for the determination of this court.

E. Avery, (*G. M. Hobbs* with him,) for the defendant.

A. J. Waterman, Attorney General, & *H. C. Bliss*, Assistant Attorney General, for the Commonwealth.

DEVENS, J. A motion for a new trial, on grounds similar to those alleged in the case at bar, is ordinarily addressed solely to the discretion of the judge who presided at the trial. Unless he shall have refused to exercise that discretion in favor of the moving party under circumstances the proved existence of which required that for some legal reason he should do so, or unless he has refused to receive and consider evidence by which that discretion should be guided or controlled, his decision cannot be elsewhere reviewed. *Woodward v. Leavitt*, 107 Mass. 453, 458. *Clapp v. Clapp*, 137 Mass. 188. *Johnson v. Witt*, 138 Mass. 79. *Commonwealth v. Desmond*, 141 Mass. 200.

In the case at bar, the defendant offered testimony as to statements made in the hearing of some of the jurors before they were impanelled, of other statements made in their hearing after they were impanelled, and of a conversation between one or more of them and a third person pending the trial. This testimony was received by the presiding judge. The defendant further offered the testimony of a juror to expressions of opinion by a certain juror to another, during the trial, and of urgency by him and the foreman, by threats, to control and improperly influence the judgment of their fellow juror. These expressions were uttered elsewhere than in the jury-room, although after the jury was impanelled, and while the trial was pending. The presiding judge ruled that the testimony of jurors as to conversations between them during the trial, whether within or without the court-room, was inadmissible to impeach their verdict, and excluded their evidence on this subject. He further held that the defendant was not, as matter of law, entitled to a new trial, and in the exercise of his discretion declined to grant it.

In regard to what was alleged to have been said in the presence of the jurors before and after they were impanelled,

the evidence was conflicting, and the evidence of one of the jurors, who testified to them, was by no means free from suspicion. His professions of a desire to do his duty are not quite consistent with his delay in making known the attempted influence to which he had himself been subjected, or that which he had sought to impose upon others. It may well have been that the presiding judge was not satisfied, upon the facts, that the occurrences testified to had taken place. In such case it would certainly have been his duty to reject the motion. But assuming, in favor of the defendant's contention, that he must have been, and was, satisfied that improper remarks had been made to the jury, there was no legal reason which rendered it his duty to grant a new trial.

Remarks made in the presence or hearing of jurors as to cases on trial cannot always be prevented. Jurors are presumed to be, and are, with those exceptions that must always exist, men of intelligence, of good moral character, and fully competent and desirous to do their duty in the matters submitted to them. It is not to be presumed that they will be affected by casual observations made in their presence, or even to them. It is for the judge in each instance to determine whether what has taken place is of this incidental character, or whether conversations or solicitations have been addressed to them of such a nature that their effect must fairly be held to have been to deprive the injured party of a fair and impartial trial. Where a party to a suit has been guilty of countenancing or promoting an interference with the jury, a stricter rule would be adopted as against him than where this interference was the act of another, even of one of his own witnesses, acting without any countenance from him, and also where the interference was the act of an officer of the court. *Woodward v. Leavitt*, 107 Mass. 453, 458. *Johnson v. Witt*, 138 Mass. 79.

It cannot be said that it was proved, upon the evidence, that there was here a studied attempt, as the defendant urges, to poison the minds of the jurors, or to deprive him of a fair trial, and that the judge was bound thus to find. The piece of testimony, that, while two of the jurors were talking together in a saloon, the barkeeper, hearing them, remarked, "Well, I guess the fellow is guilty fast enough," is much relied on as showing

that the defendant should have a new trial. This remark was heard by one juror, but not by the other. Assuming it to have been made, the presiding judge might well have considered such a remark as of very slight importance in its influence on the mind of the juror.

We are also of opinion, that the presiding judge properly excluded evidence of the conversations between the jurors, and of alleged improper urgency upon one of them by another, and also by the foreman, which took place outside of the jury-room. The reasons have been repeatedly stated which justify the exclusion of evidence as to what has taken place in the jury-room, in order to show thereby insufficient reasons, partiality, or misconduct in rendering the verdict. *Cook v. Castner*, 9 Cush. 266, 278. They were carefully restated, and the cases on the subject of the impeachment of verdicts carefully collated, in *Woodward v. Leavitt*, *ubi supra*. They apply with equal force where the conversations between the jurors take place when they, or a part of them, are together on the way to or from the court-house. While jurors are often properly advised against conversations in regard to the evidence in cases before them until they have heard the whole of it and return for their final deliberation, there is no rule of law which forbids them. The same considerations of public policy as those which induce a court not to entertain a motion to set aside a verdict on the ground of error, mistake, irregularity, or misconduct of the jury, or any of them, on the testimony of one or more jurors, will, as Chief Justice Morton observes in *Rowe v. Canney*, 139 Mass. 41, "protect the communications of jurors with each other, whether in or out of the jury-room, during the pendency of the case on hearing before them."

Motion refused.

WILLIAM McCANN vs. SIMON F. RANDALL & another.

Suffolk. March 11, 1887. — May 7, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES,
& KNOWLTON, JJ.*Statute of Limitations — Superior Court — Jurisdiction — Contempt — United States Treasury Draft — Non-resident Payee — Equitable Attachment.*

The statute of limitations of this Commonwealth is no defence to an action on a promissory note by a non-resident payee, who has always resided in the State where it was made and where such an action is not barred, although the maker has removed therefrom to a third State, the statute of which is there a bar to such an action.

A United States Treasury draft, which was issued upon the award of the Court of Commissioners of Alabama Claims, payable to a non-resident and found here unindorsed in the custody of an agent, may be reached by a creditor of the payee by a bill in equity under the Pub. Sts. c. 151, § 2, cl. 11, against both the payee and the agent, although personal service is made upon the agent alone, and the payee appears only specially to object to the jurisdiction; and if such agent, in contempt of an order of the court, delivers up the draft and procures its payment to the payee, a decree may be made that he pay the draft out of his own property after deducting the amount of any lien of his thereon. FIELD & W. ALLEN, JJ., dissenting.

BILL IN EQUITY, filed February 4, 1885, in the Superior Court, to reach and apply, in payment of a promissory note given by the defendant Randall to the plaintiff, a United States Treasury draft payable to the order of Randall and in the possession of the defendant Manning. The prayer of the bill was for an injunction to prevent the delivery up or the negotiation of the draft by Manning, who was a resident of Boston, and upon whom personal service was made. Service by publication only, in accordance with an order of notice duly issued, was made upon Randall, who was a resident of New York. The defendants, of whom Randall appeared specially, demurred to the bill for want of jurisdiction, on the ground that the debt was barred by the statute of limitations and for want of equity. The demurrers were overruled, and the defendants appealed to this court. Hearing before Barker, J., who found the following facts.

The draft, which was for \$2,646.02, the amount of an award to Randall by the Court of Commissioners of Alabama Claims, was

made payable to him at the United States Sub-Treasury in Boston, and was delivered to Manning as his attorney of record. When an injunction was issued, on February 4, 1885, as prayed for, and, on February 6, 1885, was personally served on Manning, the draft was in his possession and control in Boston, and had not been indorsed by Randall. Thereafter Manning, upon the payment to him of \$798.81, the amount of his lien thereon, as mutually agreed by them, for his services and disbursements in securing the award, sent the draft to Randall, and procured his indorsement of it and its subsequent payment at the Sub-Treasury on March 28, 1885, the balance of \$1,852.21 being handed over to Randall or his agents. On January 22, 1886, a process of attachment for contempt was issued against Manning, as it appeared that he had violated the injunction wilfully and with full knowledge; but at that time he was without, and has continued to remain without, the limits of the Commonwealth, and no service of the order of attachment was ever made upon him.

On January 18, 1869, Randall, then a resident of Maine, for a good consideration, made the note in question, payable to the order of the plaintiff, who was also a resident of that State and has ever since resided there. But on November 1, 1874, Randall removed his residence and domicil to New York, and since that time he has never been within the State of Maine. An action upon this note was not barred by the statute of limitations of Maine (Rev. Stats. of Maine of 1883, c. 81, § 103), by which actions upon promissory notes must be brought within six years after the cause of action accrued, and actions brought thereafter are barred, except that, "if a person is absent from and resides out of the State after a cause of action has accrued against him, the time of his absence shall not be taken as a part of the time limited for the commencement of the action." The statute of limitations of New York, by which actions upon such notes must be brought within six years from the time when the cause of action accrued, was a bar to an action on the note in that State; but as the plaintiff had never resided in New York or elsewhere without the State of Maine, an action against Randall was not barred by the law of another State or country while the plaintiff had been a resident therein.

The plaintiff agreed, in case he was entitled to recover in the

suit, to share proportionately the sum recovered by him with one Willard, who simultaneously had filed another bill in equity to apply the same draft to the payment of a debt due to him by Randall.

The defendants requested the judge to rule that the case was not within the equity jurisdiction of the Superior Court; that an action on the note was barred by the statute of limitations; that the draft was not "goods, effects, or credits, or right, title, or interest" of Randall, such as could be reached in this proceeding; and that a United States Treasury draft could not before payment be reached by an equitable trustee process or otherwise. The judge refused so to rule, made a decree that Manning, because of his contempt in disposing of the draft, should pay out of his own goods and estate to the plaintiff and to Willard, in their proper proportions, the balance of the draft over and above the amount of his lien, with interest thereon from March 28, 1885, to the date of the decree; and reported the case for the determination of this court.

C. Cowley, for the defendants.

E. P. Payson, (*W. E. Spear* with him,) for the plaintiff.

DEVENS, J. The defendant Randall is not entitled to a defence by virtue of our statute of limitations against the promissory note now held by the plaintiff, upon the ground that the bill was not brought within six years from the time the cause of action accrued. He is not, and never has been, an inhabitant of this State, and our statute never began to run in his favor. No personal service has been made upon him, but a suit against him, with an effectual attachment of his property in this State, or of his goods, effects, or credits here situate in the hands of others, by trustee process, or proceeding similar to that in the case at bar, would be binding upon him to the extent to which property was attached or sequestered, sufficient notice having been given to him by publication or otherwise of its pendency. *Putnam v. Dike*, 13 Gray, 535.

It is the contention of the defendant Randall (who has appeared specially) that the plaintiff is within the disability imposed by the St. of 1880, c. 98, (Pub. Sts. c. 197, § 11,) which provides that "no action shall be brought by any person whose cause of action has been barred by the laws of any State, Terri-

tory, or country, while he has resided therein." He urges that the note in suit is now outlawed as against the plaintiff by the statutes of Maine (in which State the plaintiff resided when the note was given, and where he has ever since resided), unless the defendant Randall should return within the limits of that State, and that there is, and can be, no presumption that he will so return. It is found as a fact, that Randall made the note in suit on January 18, 1869, he being then a resident of the State of Maine; that on November 1, 1874, he removed his residence and domicile to the State of New York, where he has resided continuously, and that since that time he has never been in the State of Maine. It is further found, that, by the laws of Maine, suits upon promissory notes must be brought within six years after the cause of action accrued, and suits brought after the expiration of said six years are barred, except that, "if a person is absent from and resides out of the State after a cause of action has accrued against him, the time of his absence shall not be taken as a part of the time limited for the commencement of the action." Rev. Sts. of Maine of 1883, c. 81, § 103. Upon this evidence, the presiding judge was justified in finding as a fact that the plaintiff's claim was not barred by the statutes of Maine.

By the departure of the defendant Randall from Maine, and his residence elsewhere, the statute of limitations ceased to run in his favor and against the plaintiff. This has prevented the outlawry of the note, and, so far as the statutes of Maine are before us, we cannot see why an action might not now be maintained by the plaintiff against Randall in that State, if he could find property there to attach, and thus enable the court to obtain jurisdiction in the absence of Randall personally. When this bill was brought, any action by the plaintiff in the courts of New York was there barred, as the statute of limitations of that State is found to exist, Randall having resided there more than six years. But as the plaintiff never resided in New York, his action against Randall is not barred by the law of any State or country while the plaintiff has resided therein, which is the condition provided by our own statute that would prevent his maintaining an action in this Commonwealth.

It is contended that the draft mentioned in the plaintiff's bill is not of the property, or goods, effects, or credits, or of any right,

title, or interest of the defendant Randall, and that neither it nor its proceeds can be reached by this proceeding in the nature of an equitable trustee process, or otherwise. We proceed to consider this question without regard to the character of the draft, which was one issued by the authority of the United States, and payable to the order of Randall at the Sub-Treasury of the United States in Boston. The draft was itself in the actual custody of the defendant Manning, who was entitled to a lien upon the same and its proceeds, for certain services and disbursements. This lien was for a smaller amount than the draft, and Randall was entitled to the overplus.

It will be unnecessary to consider what would be the powers of the Superior Court under the general equity jurisdiction conferred upon it by the St. of 1883, c. 223, as the case at bar comes within the express provisions of the Pub. Sts. c. 151, § 2, cl. 11, which permit "bills by creditors to reach and apply, in payment of a debt, any property, right, title, or interest, legal or equitable, of a debtor, within this State, which cannot be come at to be attached or taken on execution in a suit at law against such debtor." This clause was amended by the St. of 1884, c. 285, the purpose of the amendment being to extend its construction to certain cases to which it had been held that it did not apply; and its intention, when taken in connection with the Pub. Sts. c. 151, § 2, is seen to be to make "any property of a debtor" applicable to the payment of his debts, whether he is personally within the jurisdiction or not. That the right or property of Randall in the Treasury draft could not be come at to be attached, or taken on execution, will be conceded, and the property, title, or interest of Randall therein is of the same character as that which has been repeatedly held to make the actual holder in whose custody such securities are found liable to this process as the equitable trustee of the party sued.

While notes, drafts, etc., are often said to be evidences of debt rather than the debts themselves, they represent the debts, and the right to collect such debts is by means of them transferred from one to another. Under the clause of the statute of frauds relating to contracts for the sale of goods, wares, and merchandise, it has been held that contracts for the sale of notes were included. *Baldwin v. Williams*, 3 Met. 365, 367. Such securities are them-

selves the subjects of common sale and barter, have a market value, are intended to be transferable, and, when transferred, to convey the debts secured in a visible and tangible form. *Somerby v. Buntin*, 118 Mass. 279. The cases in which it has been decided that the possessor of promissory notes, signed by third persons, in which a debtor against whom suit had been brought had a valuable interest, might be held by the equitable trustee process to apply them, when collected, to the payment of the creditor's debt, are quite numerous. *Davis v. Werden*, 13 Gray, 305. *Moody v. Gay*, 15 Gray, 457. *Crompton v. Anthony*, 13 Allen, 33. *Barry v. Abbot*, 100 Mass. 396. "The plaintiff," says Mr. Justice Bigelow, in *Davis v. Werden*, *ubi supra*, in speaking of the St. of 1851, c. 206, on which the clause we are considering is founded, "has a claim against one of the defendants, who resides out of the Commonwealth, and who is the owner of choses in action which are in the hands of an agent residing here. This is the exact case provided for in the statute." If the possessor of the notes has himself had a just claim or lien upon them, or the proceeds to be derived from them, on the most obvious principles of justice this claim or lien has been provided for in any decree that has been made as to the application of them. *Silloway v. Columbia Ins. Co.* 8 Gray, 199. *Barry v. Abbot*, *ubi supra*. Nor can it be important that the party liable on the note is not a resident of this State, or served with process. While the remedy of the creditor may be less convenient, or perhaps less effectual, on this account, he should not therefore lose the benefit he is entitled to by reason of the possession in a third person's hands, in this State, of a valuable security in which his debtor has a property or interest, even if such security must be realized or suit brought upon it without the State.

The defendants contend that, as no personal service was made upon Randall, and as he is not before the court except as he has specially appeared to object to the jurisdiction, there can be no assignment or transfer of any right or property which he may have in the draft. The draft, although negotiable in form, had not been indorsed by him, but delivery of it to Manning, or the possession of it by him with Randall's consent, operated as an equitable assignment of it. It is true that no order could have been passed which would compel Randall personally to indorse it,

but means are, by necessary implication from the statute, to be found by which the creditor should obtain the benefit of it; whether by an order appropriating it to the benefit of the creditor by sequestration to his use, by a sale on execution, by a sale with a transfer thereof by an order made by authority of this court, or by a trustee specially ordered to transfer it, or perhaps by an order that the property shall be held until the debtor shall himself (even if not personally within the jurisdiction of the court) consent to apply it to the payment of his creditor, we need not now determine. The property sought to be reached and applied is to be so appropriated by "means," to use the phrase of the statute, "within the ordinary procedure of the court." In any order relating to such application, proper provision would be made for the just claim which the defendant Manning had upon it. *Grew v. Breed*, 12 Met. 363, 370. *Robinson v. Robinson*, 9 Gray, 447, 450. *Norton v. Piscataqua Ins. Co.* 111 Mass. 532, 535. *Walsh v. Walsh*, 116 Mass. 377, 382. *Felch v. Hooper*, 119 Mass. 52. *Perry on Trusts*, 820 a. *Daniel Neg. Instr.* § 741.

It is further urged, that, as the draft in question was one drawn by the Treasurer of the United States upon the Sub-Treasury in Boston, and was what is known as a Treasury draft, there could be no appropriation of it, by any legal proceeding, to the benefit of the creditor. The proposition mainly relied on is, that as the government of the United States could not be sued as the sovereign power, and that as the Assistant Treasurer, upon whom the draft was drawn at Boston, had he seen fit to refuse to recognize the judicial transfer of the draft, in whatever form made, could not have been compelled by any order of this court to pay the money due thereon, there could be no transfer of it, or of Randall's right therein. The government of the United States, as a party to a contract, agreement, trust, bond, or instrument, as a note, draft, or order, is like a private party, except so far as it regulates by law its liability. It may make, and has made, many contracts with it unassignable, sometimes partially, sometimes entirely so, as its own convenience seemed to dictate, in the administration of public affairs, although even in these cases transfers by operation of law, by assignment to creditors, by will, or by descent, have usually been recognized

as constituting sufficient assignment of the claim or contract. *Milnor v. Metz*, 16 Pet. 221, 222. *Erwin v. United States*, 97 U. S. 892. *Goodman v. Niblack*, 102 U. S. 556.

When the United States becomes a party to negotiable paper, whether note, bill of exchange, or draft, the responsibility which it assumes is the same as that assumed by any private person. It cannot, indeed, be sued except as it consents to be, and it may not be possible to reach and control its officers by the same processes that may be applied to private individuals. It was held in the celebrated case of *The Floyd Acceptances*, 7 Wall. 666, that the government of the United States had the right to use bills of exchange for the purpose of conducting its operations, as an appropriate means, and that it was bound by the same principles that govern individuals in their relations to such paper. The only important question was, whether Mr. Floyd, the Secretary of War, had authority as the agent of the United States, by virtue of his office, to accept the bills drawn upon him. In *Bank of Republic v. Millard*, 10 Wall. 152, where the question was whether the holder of a bank check could sue the bank under the circumstances stated, the court remark: "It is hardly necessary to say, that the check in question having been drawn on a public depository, by an officer of the government, in favor of a public creditor, cannot change the rights of the parties to this suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents." This is but a restatement of what had been often previously decided. *United States v. Bank of Metropolis*, 15 Pet. 377, 392. *Walker v. Smith*, 21 How. 579. *Pennsylvania v. Wheeling Bridge*, 13 How. 518, 560. *Pierce v. United States*, 7 Ct. of Cl. 65, 68.

A suit to compel the assignment of a bond or other security of a State in no way affects the sovereignty of such State. *Pingree v. Coffin*, 12 Gray, 288, 321. That the draft in the case at bar was drawn by authority of law, and in the usual course of business, cannot be disputed. It operated as a payment of Randall's claim, and constituted a new contract with the government, in which any previous claim was merged. It was valid and binding on the United States in the hands of any

bona fide holder thereof by indorsement for a valuable consideration, whether suit could have been brought upon it or not, as commercial bills of exchange and promissory notes are between individuals, whatever objections there may have been to the original settlements or claims on which they were issued. *McKnight v. United States*, 13 Ct. of Cl. 292, 305. U. S. Rev. Sts. § 308. *McKnight v. United States*, 98 U. S. 179.

The claim originally held by the defendant Randall was not, properly speaking, a debt due from the United States, but arose from the fact that the United States held certain funds received from Great Britain, under a treaty with that power, which were to be distributed, through appropriate channels, to those who had suffered from depredations upon our commerce during the late civil war. This in no way affected the character of the draft, which was given in pursuance of an adjudication in favor of Randall by the Court of Commissioners of Alabama Claims. Even before merger in the draft, the equitable interest in such a claim would have passed to an assignee in bankruptcy. *Leonard v. Nye*, 125 Mass. 455. It cannot be assumed that the Assistant Treasurer of the United States would have disregarded any transfer of the draft by operation of law, or in the course of judicial proceedings conducted by a court having jurisdiction over the person of the actual holder thereof, who was in possession of it by virtue of his relation to or authority from Randall, to whose order it was payable. Nor, had payment thereof been refused, would the transferee have been remediless. The Court of Claims of the United States would have been open to him, and it has the right, under the statutes which give it jurisdiction for the purpose, to hear and determine all claims "founded upon any contract, express or implied, with the Government of the United States." *Milford v. Commonwealth*, 144 Mass. 64, and cases cited.

It has been found that the debt was actually due from Randall to the plaintiff, and, after service of process in this case upon Manning, and after service of an injunction upon him, forbidding its transfer to Randall, the draft being at that time in Boston, the amount claimed by Manning as due upon his alleged lien was settled by mutual agreement, and the draft was sent to Randall in New York, and was there indorsed by him.

Payment of it was made at the Sub-Treasury in Boston thereafter, and the amount received by Randall, or his agents, was the sum of \$1,852.21, which was the amount due over and above \$793.81, which had been settled as the amount of Manning's lien, and which Manning then or previously received. As the rights of the parties were fixed, at the time of the notice of the *lis mota*, no temporary injunction was perhaps necessary forbidding any transfer of property until the final decree. *Maxwell v. Cochran*, 136 Mass. 73, 74. But it is found that the indorsement and payment of the draft were procured by Manning in wilful disobedience of the order of the Superior Court, and in contempt of its lawful authority. Under these circumstances he has incurred a liability commensurate with the value of the property which he has thus succeeded in withdrawing from the control of the court, and prevented from being applied to the lawful claims of Randall's creditors. Proceedings for contempt may be either for the purpose of inflicting punishment upon one who has wilfully disobeyed a lawful order of the court, or for the purpose of obtaining the result which might have been reached by the enforcement of its decree but for the intervention of the wrongful act of the party violating its order, or in appropriate cases for both purposes. *Cartwright's case*, 114 Mass. 230. *Maxwell v. Cochran*, *ubi supra*. *Stimpson v. Putnam*, 41 Vt. 238. *Thweatt v. Gammell*, 56 Ga. 98. *Mathews v. Spangenberg*, 15 Fed. Rep. 813.

With the suit brought by the plaintiff was also heard one brought by one Willard, under precisely similar circumstances, which for that reason does not require any separate consideration, as there was no dispute between the plaintiff and Willard as to the proportions in which they were to receive the fund if it was appropriated to them.

We are of opinion that the presiding judge in the Superior Court rightfully held that Manning was bound to make up and pay to the plaintiff, and others standing in like relation, the balance of the draft over and above the sum of \$793.81, namely, the sum of \$1,852.21, with interest thereon from March 28, 1885 (which was the day of payment of the draft), to the making of the final decree. A majority of the court is of the opinion that the entry should be,

Decree affirmed.

FIELD, J. Mr. Justice William Allen and myself are unable to assent to the opinion of the court. The decree in this case is not a decree in the proceedings for contempt against Manning, and the question need not be considered whether Manning could not be punished for violating the injunction, although the bill should be dismissed. The decree is the final decree in the cause, and it proceeds against Manning on the ground that he has, during the pendency of the suit, put wrongfully out of his possession property of Randall which had been equitably attached in the suit, and which he could have been compelled to deliver to the court or to the plaintiff, to be applied in satisfaction of the debt due from Randall to the plaintiff.

The first questions of law arise upon the appeal from the orders overruling the demurrers of each of the defendants, but the same questions of law are raised upon rulings requested which were refused. The fundamental question in the case is whether the Superior Court had any jurisdiction over the draft, to apply it to the payment of the debt due to the plaintiff from Randall. Manning's interest in the draft could not be so applied, because he was not indebted to the plaintiff. After Manning had been paid the amount of his claim, he held the draft as an agent or bailee of Randall. The court had no jurisdiction to render a personal decree against Randall, as he had never been a resident of the Commonwealth, or served with process within the Commonwealth, or appeared generally in the suit. This is now the settled law, under the Constitution of the United States; and before the adoption of the Fourteenth Amendment of that Constitution it was settled here that no decree in equity could be rendered against such a defendant, which could bind him personally to do anything. *Spurr v. Scoville*, 3 Cush. 578. *Moody v. Gay*, 15 Gray, 457. *Walling v. Beers*, 120 Mass. 548. *Eliot v. McCormick*, 144 Mass. 10. As was said in *Moody v. Gay*, *ubi supra*, "A court of equity can only deal with persons who can be compelled by process to perform its decrees; and with property, which is either situated within the limits to which its jurisdiction extends, or which can be reached through the action of parties who are amenable to its authority."

The draft was drawn by one officer of the United States upon another officer, payable out of the moneys of the United States,

and it was in effect a negotiable promissory note of the United States. *Commonwealth v. Butterick*, 100 Mass. 12. *Miller v. Thomson*, 3 M. & G. 576. The United States were not, and could not have been made, parties to the suit. If this draft had been drawn by a private person upon himself, and he had been a resident of this Commonwealth, it might be contended that he would have been liable to trustee process in an action at law against Randall; for although a complete copy of the draft does not appear in the papers, it is not contended that the draft was payable on time. Whether this could have been done in the case supposed, and Manning have been admitted as a claimant to the extent of his interest, is immaterial in the case at bar, because the United States are not amenable to trustee process, and therefore this remedy at law does not exist. Pub. Sts. c. 183, § 34, cl. 1. *Macomber v. Doane*, 2 Allen, 541. *Darling v. Andrews*, 9 Allen, 106. *Scott v. Hawkins*, 99 Mass. 550. *Fay v. Sears*, 111 Mass. 154.

As the United States are not amenable to any process issuing from a State court, the inquiry is, whether there is any procedure in this Commonwealth whereby a creditor can reach, and apply to the payment of a debt due to him from the defendant, a debt due to the defendant from another person, when neither the defendant nor that other person is amenable to the process of the court. The case may be considered as if the facts were that a citizen of Maryland, in payment of a debt, had given his promissory note to a citizen of New York, payable to him or his order, and had intrusted the note to a citizen of Massachusetts for delivery to the payee, and a citizen of Maine had attached the note by the equitable process used in this suit while it was within the Commonwealth and held by the citizen of Massachusetts for the purpose of delivering it to the payee.

It is conceded that a State has jurisdiction over all persons and property within its limits, and may subject all property found within its limits to the payment of debts due not only to its citizens, but to the citizens or subjects of other States whom it permits to sue in its courts. To what extent, and in what manner, such property may be taken, depends upon the law of the State. Other States may or may not recognize titles to property acquired in this manner, but the courts of a State must proceed according

to the statutes of the State, if they are constitutional and valid statutes, and according to its customary law. It is now considered that a person who has never been a citizen of a State, or domiciled within it, and who is not personally found within it and served with process, or who has not by an appearance in the suit, or by contract, or in some other manner, submitted himself to its jurisdiction, owes no duty to the State to appear before and submit himself personally to the decision of its courts. *Schibsby v. Westenholz*, L. R. 6 Q. B. 155. *Freeman v. Alderson*, 119 U. S. 185.

It has been suggested that, even if the court could not directly apply this draft to the payment of the debt due from Randall to the plaintiff, it could sequester it for the purpose of compelling Randall to perform any decree it might render against him. No such attempt, however, was made in this case. A writ or commission of sequestration is a process of contempt against the property of the defendant, for the purpose of compelling him to obey, or perform, some order or decree of the court. After the subpoena has been served, it may be issued to compel him to appear or to put in his defence, or to obey any decree, interlocutory or final, which the court has made. Chattels and choses in action may be sequestered, and the debtors of the defendant if parties to the suit, or, if not, by ancillary proceedings making them parties, may be compelled to pay the money they owe to the defendant into court. *Grew v. Breed*, 12 Met. 363. A sufficient reason why no writ of sequestration, as distinct from process of execution, ought to issue in this case against Randall, is that he has never been in contempt, because the court can make no order or decree which he is personally bound to perform. A writ of sequestration ought only to issue after the defendant has been served with such process as makes him subject to the jurisdiction of the court, according to the law of the tribunal. A writ of sequestration may, perhaps, issue against a defendant who is without the jurisdiction, but resident within it, and who has absconded to avoid service of process; but there is no satisfactory authority for issuing such a writ against a defendant who has never been subject to the jurisdiction, in order to compel him to appear in a suit brought for the collection of a debt. If this draft can be seized, it must be by some process whereby it, or the

proceeds of it, or the debt of which it is evidence, can be taken and held, and ultimately applied to the payment of the debt due to the plaintiff, and not by any sequestration of it, if it cannot be so taken and applied, in order to compel Randall personally to appear in the suit and pay the debt established by the decree.

It is argued that this draft is a chattel found within the Commonwealth, and therefore may be taken and applied to the payment of the plaintiff's debt. It may be assumed, without consideration, that there is nothing in the Fourteenth Amendment of the Constitution of the United States which prevents this from being done. The question is, whether such a proceeding is authorized by our laws.

For certain purposes, bills and notes are regarded in this Commonwealth as chattels. They may be the subject of conversion. *King v. Ham*, 6 Allen, 298. They were not the subject of larceny at common law, but have been made so by statute, in connection with books of account and written contracts, receipts, releases, etc. Pub. Sts. c. 203, § 20. They are goods, wares, and merchandise, within the meaning of the statute of frauds; *Baldwin v. Williams*, 3 Met. 365; and they may be the subject of a gift, either *inter vivos* or *causa mortis*, and so may savings bank books, and some other evidences of debt. *Grover v. Grover*, 24 Pick. 261. *Sessions v. Moseley*, 4 Cush. 87. *Bates v. Kempton*, 7 Gray, 382. *Chase v. Redding*, 13 Gray, 418. *Hunt v. Hunt*, 119 Mass. 474. *Sheedy v. Roach*, 124 Mass. 472. *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425. *Tuft v. Bowker*, 132 Mass. 277. They were not liable to be taken on execution at common law, and they have not been made liable by statute. *Maine Ins. Co. v. Weeks*, 7 Mass. 438. *Perry v. Coates*, 9 Mass. 537. The Pub. Sts. c. 171, § 33, provide that "bank-notes and all other bills or evidences of debt, issued by a moneyed corporation and circulated as money, may be taken on execution and paid to the creditor at their par value as money collected, if he will accept them; otherwise they shall be sold like other chattels." But bills of exchange and promissory notes which do not circulate as money are not included in the statute.

In England, by statute, an execution may be levied upon bills of exchange, promissory notes, bonds, and other securities for money, and the sheriff or other officer is authorized to sue for

and recover the sums secured. 1 & 2 Vict. c. 110, § 12. Promissory notes of third persons are not goods, effects, and credits, within the meaning of our statutes relating to trustee process. The maker of the note may be summoned as the trustee of the holder, if the note is not payable on time or is overdue. *Lupton v. Cutter*, 8 Pick. 298. *Lane v. Felt*, 7 Gray, 491. *Hancock v. Colyer*, 99 Mass. 187. Promissory notes were admissible in evidence under the money counts in the old forms of pleading, and an action at law can be maintained against the maker of a promissory note which has been lost or destroyed, when a bond of indemnity will afford complete protection to the defendant; and when it will not, a suit in equity can be maintained. The loss or destruction of the note is not an extinguishment of the debt of which it is evidence. *Fales v. Russell*, 16 Pick. 315. *Almy v. Reed*, 10 Cush. 421. *Tower v. Appleton Bank*, 3 Allen, 387. *Tuttle v. Standish*, 4 Allen, 481. *Savannah Bank v. Haskins*, 101 Mass. 370. *McGregory v. McGregor*, 107 Mass. 543. *Tucker v. Tucker*, 119 Mass. 79. *Hinckley v. Union Pacific Railroad*, 129 Mass. 52.

For the purpose, therefore, of reaching and applying the promissory note of a third person to the payment of a debt due to the plaintiff from the owner of the note, the note in this Commonwealth is not regarded as a chattel, but as the evidence of a debt, although, by reason of the law merchant, it is evidence of a peculiar character. There are only two methods in this Commonwealth whereby a note has been so applied: one is, by making the persons liable on the note parties to the suit, and compelling them to pay what they owe into court, or to the plaintiff in the suit; and the other is, by compelling the owner of the note to assign it, that it may be delivered to the plaintiff, or may be sold or collected, and the proceeds paid into court or to the plaintiff. It is because there is no remedy at law that the plaintiff brings this suit in equity, and as his debt has not been reduced to a judgment, his bill is not within the general equity jurisdiction, and he must rely upon the statutes. St. 1851, c. 206. St. 1858, c. 84. Gen. Sts. c. 113, § 2. Pub. Sts. c. 151, § 2, cl. 11. St. 1884, c. 285, § 1. In all the cases reported under these statutes in which a promissory note has been reached and applied in equity, either the persons liable on the note have

been made parties defendant and brought by process within the jurisdiction of the court and compelled to pay the amount due into court or to the plaintiff, or the principal defendant, owner of the note, has been made a party, and brought within the jurisdiction of the court, and compelled to deliver up the note, and in effect to assign it, or all these persons have been brought before the court.

The first case reported is *Silloway v. Columbia Ins. Co.* 8 Gray, 199. The principal defendant was a foreign insurance company, doing business in this Commonwealth under the statutes, and the other defendant, Edwards, was its general agent in this Commonwealth, appointed in pursuance of the statutes. Both defendants were served with process, appeared, and answered, and the company in its answer set up certain objections to the bill by way of demurrer. The case was heard by the full court on the bill and answer. The plaintiff was a creditor of the company on policies of insurance which it had issued in this Commonwealth, under which losses had occurred, and he had brought an action at law here, but was unable to find property which could be attached, and the bill alleged that Edwards had in his hands property of the company, "consisting of promissory notes given to the company in payment of premiums on policies of insurance issued by" the company "in this Commonwealth." In this case the court had full jurisdiction over both defendants for the purpose of collecting a debt due from the principal defendant; and although the company was a foreign corporation, it had, under the statutes, appointed a citizen of the Commonwealth "a general agent upon which all lawful process against the company may be served, with like effect as if the company existed in this State," and the process against the company was served upon this general agent.

The next case is *Sanger v. Bancroft*, 12 Gray, 365. The bill was brought to collect a debt due to the plaintiff from Bancroft, who resided in California, and to reach a mortgage of land in this Commonwealth given by Brigham to Bancroft to secure the payment of a promissory note, which mortgage had been assigned without consideration to Tubbs. The note secured by the mortgage had not been assigned. Apparently Bancroft was not served with process, but Brigham and Tubbs were. The

note was not within the Commonwealth, and was held by Bancroft or some person unknown. The bill was dismissed.

The third case is *Davis v. Werden*, 13 Gray, 205. It does not appear by the report whether Couch was a party to the suit, but the papers on file show that he was served with a subpoena within the Commonwealth. It was a bill brought by a creditor of Couch and Werden, formerly copartners in this Commonwealth, where the plaintiff and Couch continued to reside, to attach certain promissory notes given by Couch to Werden, and put by Werden into the hands of Royce in this Commonwealth for collection. Werden, at the date of the bill, resided in Illinois. There was a decree for the plaintiff, but the form of it does not appear. Royce as well as Couch, the maker of the notes, was within the jurisdiction of the court, and was served with process within the Commonwealth.

In *Moody v. Gay*, 15 Gray, 457, the principal defendants, Gay and Pitkin, debtors of the plaintiffs, were inhabitants of this Commonwealth and parties to the suit, and the property reached was a mortgage to Pitkin of real estate in this Commonwealth. In *Barry v. Abbot*, 100 Mass. 396, the original papers show that Abbot, Blood, and Chamberlain were all residents within the Commonwealth, and duly served with process, and appeared and answered. In *Tucker v. McDonald*, 105 Mass. 423, all the parties to the chose in action were before the court. In *Anthracite Ins. Co. v. Sears*, 109 Mass. 383, Sears, the owner of the policy of insurance, was a party served with process, and subject to the jurisdiction of the court. *Phoenix Ins. Co. v. Abbott*, 127 Mass. 558, decides that proceedings under the Gen. Sts. c. 113, § 2, now the Pub. Sts. c. 151, § 2, cl. 11, are in the nature of an equitable trustee process, and that some other person than the plaintiff's debtor must be made a defendant, and that a bill cannot be maintained for the purpose of compelling a defendant by injunction to hold in his own possession his property, until a decree be obtained against him, in order that the property may be taken and applied to the payment of the debt established by the decree. Some of the earlier cases, in which there was no equitable trustee before the court, are criticised and explained in the opinion.

The plaintiff relies especially upon the St. of 1884, c. 285, § 1, passed since the decision in *Phoenix Ins. Co. v. Abbott*.

That statute was apparently passed to change the law as declared by the following decisions of this court. *Chapman v. Banker & Tradesman Publishing Co.* 128 Mass. 478. *Phoenix Ins. Co. v. Abbott*, *ubi supra*. *Carver v. Peck*, 131 Mass. 291. *Russell v. Milton*, 133 Mass. 180, 181. The only provisions of this statute which concern this case are those which relate to property which is in the hands, possession, or control of the debtor, independently of any other person, or is not within the State. These provisions do not indicate any intention to extend the jurisdiction given by the Pub. Sts. c. 151, § 2, cl. 11, beyond the general jurisdiction of courts of equity to subject property which cannot be taken on execution to the payment of a judgment obtained at law. The nature of this general jurisdiction in equity is stated in *Carver v. Peck*, *ubi supra*, as follows: "As the process of a court of chancery operates *in personam*, it is within the power of such a court, having jurisdiction of the person of the defendant, to compel or restrain a conveyance of his interest in personal property, or even in real estate, although the property or estate is itself outside the territory to which the jurisdiction of the court is limited." I have found no case decided by any court in which, under this general jurisdiction, choses in action have been taken and applied in payment of a judgment, where none of the parties to the choses in action was amenable to the jurisdiction of the court, and the statutes did not authorize the choses in action to be levied upon and sold.

Ager v. Murray, 105 U. S. 126, was a suit on a judgment at law, and shows the procedure when, under this general jurisdiction, letters patent, or other intangible property, are taken and applied to the payment of a judgment.

The authority to appoint a trustee to execute an assignment for the defendant, instead of compelling him to execute one, is derived from statute. Our statutes permit a bill in equity to be inserted in a writ, and attachments of property to be made as in actions at law, and also permit writs of seizure or of execution in common form to issue when such process appears to be an appropriate method of enforcing a decree in equity. Pub. Sts. c. 151, § 29. The Pub. Sts. c. 141, § 22, authorize the court to appoint some suitable person in the place of a trustee of real or personal estate, under an express or implied trust, to

sell, convey, or transfer the property when the trustee is "under the age of twenty-one years, insane, out of the Commonwealth, or not amenable to the process of any court therein which has equity powers." There are statutes relating to the appointment of a person to act for others in certain cases, and to the appointment of receivers, and the vesting in them of the title to property, but the case at bar is within none of these statutes.

Independently of statute, a court of equity cannot appoint a person to execute a transfer of the property of another in his name. It may compel a debtor of the principal defendant, if it have jurisdiction over him, to pay to the plaintiff the debt he owes to this defendant, but it does this only when it has jurisdiction over the person of that debtor; and it may compel an assignment of choses in action, but it does this only when it has jurisdiction over the owner of the choses in action. Courts of law can transfer the title to property. In real actions, they declare the title and transfer the possession; in personal actions, by virtue of a levy of execution they transfer both title and possession; but decrees of courts of equity, except where statutes have made other provisions, operate only *in personam*. "This power of creating and extinguishing titles the chancellor never had nor claimed to have, except when it was given him by statute. It is true that he frequently directed the sale of property, but it was by his control over the person of the owner that he made the sale effective, i. e., when the sale had been made he compelled the owner to execute a deed pursuant to the sale; and hence, when the owner was out of the jurisdiction, or labored under any incapacity, e. g., that of infancy, the chancellor was powerless." Langdell Eq. Pl. (2d ed.) § 43, note 4. 3 Pom. Eq. Jur. § 1317. *Hart v. Sansom*, 110 U. S. 151. It is for want of this power, independently of statute, that the bill was dismissed in *Spurr v. Scoville*, *ubi supra*. It was under the statute passed to supply this want of power that *Felch v. Hooper*, 119 Mass. 52, was decided.

In *Shaw v. Wright*, 3 Ves. Jr. 22, Lord Chancellor Loughborough said, "You will not find any instance of an order to sell under a sequestration a subject, which passes by title and not by delivery," and the St. of 36 Geo. III. c. 90, was passed. The power of a court of equity to appoint or direct its clerk or

a master to make conveyance of property rests, where it exists, upon statute. If any power is now exercised by courts of equity independently of statute to vest the title to property in receivers, except by conveyance from the owner, it is exercised only when the court has acquired full jurisdiction over the person of the owner.

This case is not one in which the plaintiff claims title to the draft, and where a decree can be made declaring his title. He contends that the draft is the property of Randall, and that the title should be transferred to him, or to some person for him, so that it, or its proceeds, may be applied to the payment of the debt which Randall owes him. The draft cannot be taken on execution. The United States cannot be compelled to pay the debt into court or to the plaintiff; the court is not authorized by any statute to appoint any person to assign or convey Randall's property in the draft, either by indorsing it or by delivering it to any person, and it has no jurisdiction over Randall to compel him to do these things. To compel the delivery of the draft to the plaintiff, without transferring the title to him, would be an abuse of process, and would give the plaintiff no right to collect the draft.

Whether it were wise to subject such a chose in action as this is to judicial sale, when none of the parties to it is within the jurisdiction of the court, is, if there be no constitutional objection, a question for the Legislature. It is to be noticed that the statutes do not permit a person to be summoned as trustee in trustee process "who is not a resident of the Commonwealth," or a corporation "which is not established under its laws, . . . unless he or it has a usual place of business in the Commonwealth." Pub. Sts. c. 183, § 1. If the statutes relating to equity jurisdiction which are relied on were intended to give to a creditor whose debt has not been reduced to a judgment means of collecting it which are analogous to those which are afforded by an arrest of the debtor, they would not authorize these proceedings against a non-resident debtor who had never been served with process within the Commonwealth, and had never appeared in the suit. I think that the existing statutes confer no jurisdiction over this draft to apply it to the payment of the debt due to the plaintiff, and that the bill should be dismissed.

DANIEL A. DALEY, administrator, *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Suffolk. January 19, 20, 1888. — May 7, 1888.

Present: MORTON, C. J., DEVENS, HOLMES, & KNOWLTON, JJ.

Declaration — Amendment — Exceptions — Master and Servant — Railroad Operation — Employee — Loss of Life — Negligence.

A declaration recting in one count two distinct causes of action is amendable so as to set them forth in distinct counts, if the plaintiff intended to state and rely upon both, although it thereby becomes demurrable.

At the trial of an action against a railroad company, for personal injuries to one of a gang of laborers engaged in discharging coal from a vessel into the defendant's cars, there was evidence that it was the vessel's duty, at its own expense, to place the coal on the defendant's wharf, and that of the defendant to load it upon its cars, both being done as one operation; that the engine and apparatus used belonged to the defendant; that the defendant's dock-master had the general control of the wharf, docked arriving vessels, employed the engineer and foreman of the gang, and had employed and discharged others of the gang; and that the vessel paid its dues to the defendant's cashier, who retained a part for the use of the apparatus and gave the rest to the foreman for division among the gang. *Held*, that a jury would be warranted in finding that the person injured was in the employment of the defendant.

The transfer from a vessel to cars of freight to be forwarded is a railroad operation, within the meaning of the Pub. Sts. c. 112, § 212, as amended by the St. of 1883, c. 243, providing that a "corporation operating a railroad" shall be liable for negligence resulting in the death of an employee.

The injuries were caused by the breaking of a defective rope, it being the duty of the dock-master or his assistant to repair and replace such ropes, and of the foreman of the gang to ask for a new rope if that in use was unsafe. The presiding judge refused to instruct the jury, that, if it was the foreman's duty to ask for a new rope and he knowingly omitted to do so, no recovery could be had, but submitted to them the question whether it was the duty of the foreman and of the gang to get a new rope, or of the defendant to provide a proper one. *Held*, that the defendant had no ground of exception.

TWO ACTIONS OF TORT. The first case was for causing the death of Thomas Daley, the plaintiff's intestate, and the second case was for his suffering before he died.

The original declaration inserted in the writ in the first case was as follows:

"And the plaintiff says that the said deceased Thomas Daley was, on or about the twelfth day of September last past, employed by the defendant as laborer, and was engaged in the hold of a vessel, lying at defendant's wharf in said Boston, in filling

iron buckets with coal, in the process of unloading said coal from the hold of said vessel to said wharf. And that the defendant owned and controlled, and by its agents used and managed, an engine and hoisting apparatus, situated on said wharf, for raising said buckets filled with coal to said wharf. And the plaintiff says that the defendant operated and managed said apparatus and machinery negligently, unskilfully, and carelessly, and did not employ and have there suitable and proper ropes, in proper order and condition, and did not have and employ agents of proper knowledge and skill to operate and manage said ropes, engine, and apparatus; so that, while the said Thomas Daley was so engaged in the hold of said vessel, and while in the exercise of due care, and by reason of the carelessness and negligence of the defendant, and want of skill and care of its agents, and by reason of the defective condition of said ropes and machinery, one of said iron buckets, filled with coal, was dropped upon said Thomas Daley, and he was thereby so cut, bruised, maimed, and injured that he suffered great pain, and died two days or thereabouts thereafter."

The plaintiff filed a motion in the Superior Court, before trial, to amend this declaration by adding three counts, the first of which was as follows :

" And the plaintiff says that on the twelfth day of September, 1885, the defendant was a railroad corporation operating a railroad in said Boston; that said corporation was then and there engaged in its business and work of unloading coal from the hold of a vessel on to the defendant's wharf and into the defendant's cars on its railroad tracks; that the said business of removing said coal from said vessel into the defendant's cars was then and there in, and a part of, its business of operating its railroad, and that for the said work and business the defendant furnished and had in use a certain hoisting apparatus, consisting in part of an engine, a fall of rope, and large iron buckets; that said Thomas Daley was then and there an employee of the corporation, and at work in the hold of said vessel, in the said work and business of said corporation; and that on said day, by the negligence and carelessness of said defendant in not furnishing and having then and there a safe, suitable, and proper apparatus, especially a strong, safe, and proper rope for the said work and business, but

in having and furnishing a weak, unsafe, damaged, and improper rope, which broke, thereby causing a heavy iron bucket loaded with coal to fall upon said Thomas Daley while at work as aforesaid, and being in the exercise of due care, he the said Thomas Daley was killed. The said Thomas Daley left no widow, but did have and leave six children; and this plaintiff makes and brings this claim in this suit for the use of said children, according to the statute in such case provided."

The second count, which the plaintiff afterwards at the trial elected to strike out, set forth a cause of action under the statute for the death of the intestate through the negligence and carelessness of the defendant; and the third count, which was subsequently abandoned by the plaintiff, and the second action brought by him, set forth an action at common law for the suffering of the intestate.

At the hearing upon the motion, before *Mason, J.*, there was evidence tending to show that the plaintiff intended, when he brought the action, to set forth and to rely upon a cause of action at common law, for injuries and sufferings of his intestate, and also a cause of action under the statute, for the death of his intestate. The defendant requested the judge to rule as follows:

"1. That the declaration sets forth a good cause of action at common law, and does not set forth a good cause of action under the statutes. 2. If the court shall find as a fact that the plaintiff intended to bring his action for this cause, to wit, at common law, he cannot now be authorized to amend his declaration in the manner proposed by him, so as to set forth a new cause of action, together with the cause of action for which the action was originally brought. 3. If the court shall find as a fact that the plaintiff also intended originally to bring his action under the statute, as well as at common law, he cannot be permitted to amend in the manner in which he proposes to amend, because the two causes of action cannot be joined in the same suit."

The judge refused to pass on the rulings requested, except so far as was involved in allowing the amendments, and permitted the plaintiff to amend his declaration in accordance with the motion. The defendant alleged exceptions.

Samuel Hoar, for the defendant.

J. B. Richardson, for the plaintiff.

DEVENS, J. This bill of exceptions applies only to the first case. There was a motion made in the Superior Court before trial, by the plaintiff, to amend the original declaration filed by him, with the writ, by filing distinct counts embracing the two causes of action, namely, for the loss of the intestate's life and for his sufferings prior thereto. By the bill of exceptions it appears that, at the hearing on the motion, "there was evidence tending to show that the plaintiff intended, when he brought the action, to set forth and rely upon a cause of action at common law for injuries and sufferings of his intestate, and also a cause of action under the statute for the death of his intestate." This evidence is fortified by an examination of the declaration itself, which must be construed as intending to include in one count two distinct causes of action, however imperfectly they, or one of them, may be stated. The presiding judge declined to pass upon several rulings requested by the defendant, except so far as they were involved in allowing the amendments which he permitted. To this the defendant excepted.

The rulings requested are to be examined only with a view of ascertaining whether they contain any legal proposition which in itself, or in connection with other facts appearing by the bill, rendered it erroneous to grant the plaintiff's application. A party is not entitled to rulings, correct in point of law as general propositions, which have no immediate bearing on the matter in dispute. *Fish v. Bangs*, 113 Mass. 123. As the original declaration itself, and the evidence before the judge, tended to show that the plaintiff intended to rely on both the causes of action stated, it must be deemed that by granting the amendment which permitted the plaintiff to restate them in distinct counts, the court decided that the plaintiff did thus intend. This must be held to have been involved in its decision, when nothing appears showing that it rested the leave to amend upon any other ground.

Even if it is true that the one cause, that at common law, was well set forth, and the other, that arising under and by virtue of the statute, but imperfectly so, this affords no reason why an amendment of the latter should not be made. An accurate statement is the object which the amendment seeks to attain. It is true, as the defendant contends, that the court cannot per-

mit a plaintiff to amend his declaration so as to sustain his action for a cause for which he did not intend originally to bring it, but the court was not required, at the request of the defendant, to lay down this abstract proposition. The argument of the defendant is, that the court may have found that the plaintiff did not originally intend to bring his action for the cause arising under the statute, as it refused formally to rule on the propositions requested. A bill of exceptions is, however, to show affirmatively some error committed by the court below. As it may well have been that the court may have found that the plaintiff did intend to bring his action under the statute, and as all inferences are to be in favor of the result reached by it in permitting the amendment, no ground of exception appears.

The defendant further contends, that the plaintiff could not be permitted to amend by putting two causes of action, which could not be thus joined, into one suit, and that such was the effect of the amendment. The court had authority to permit the declaration to be so amended as properly to state the causes for which it was brought. The effect of this amendment was not immediately in question. If the result was that the declaration as thus amended was demurrable, or that the plaintiff would be compelled before proceeding to trial to abandon one or the other count, that was a matter to be thereafter decided. The entry must therefore be,

Exceptions overruled.

THE cases were tried together in the Superior Court, before Thompson, J., who allowed a bill of exceptions, in substance as follows.

Thomas Daley, the intestate, was a shoveller, and one of a gang of men who were at work, on September 12, 1885, in the hold of the schooner John H. Kranz, then lying at the Grand Junction Railroad Wharf in East Boston with a cargo of coal, there to be delivered for carriage in the defendant's cars to Brookline. Upon the wharf was a coal-run, under which were several tracks for the cars of the defendant. Upon this coal-run stood a stationary engine, from the drum of which a rope or fall ran to the masthead of the schooner through a block or pulley, called a gin, and down through a hatchway into the hold of the schooner. To this fall was attached a large iron bucket, which was filled

with coal by the gang of shovellers in the hold. One of the gang, called a stage-man, stood on a stage projecting from the run, and signalled the engineer of the stationary engine to hoist or lower the bucket, the coal when hoisted being emptied by him into a barrow, wheeled across the run, and dumped into a car standing underneath upon the track. On that day the rope or fall was rotten and unfit for use, and a bucket loaded with coal, while being hoisted thereby, fell and struck Daley, and inflicted injuries from which he died three days afterwards. The Grand Junction Railroad Wharf, tracks, cars, coal-run, stationary engine, stage, barrows, fall, gin, and buckets were the property of the defendant. The defendant did not contend that there was any contributory negligence on the part of Daley.

Evidence was introduced tending to show that one Thornton, in the employment of the defendant, had charge of the Grand Junction Wharf and of the coal-run; that he took charge of the vessels as they came in and put them into their berths; that he told the gang, when the vessels were ready to be discharged, to go ahead with the unloading; that on one occasion he discharged the whole gang, and then took them back; that he told the gang when to go to work and when to stop; that he hired the stage-man, one Gallagher, who was the foreman of the gang, as well as other members of the gang; that the gang were paid by the ton for unloading a vessel, according to the weight of the coal or the bill of lading, and were not paid off until the whole vessel was discharged; that no one had anything to do with the unloading except the engineer of the stationary engine, the stage-man, and the gang; that Gallagher received the money for unloading a vessel from one Beale, the cashier of the defendant, in its freight office in East Boston, and divided it among the gang; that, in the absence of Gallagher, the shovellers got the money at the freight office, and divided it up among themselves; and that the engineer of the stationary engine was in the employment of the defendant.

Beale testified that he was in the defendant's employ, as the cashier at its wharf in East Boston; that he received from the captain of the John H. Kranz payment for taking the coal out of her at the rate of twenty-five cents a ton, out of which he paid off the gang through its foreman, and also paid the defend-

ant for the use of the engine, tackle, and fall ; that the engineer of the stationary engine was an employee of the defendant, and was let with the engine to the vessel ; that all the employees of the defendant were paid by its regular paymaster ; and that he had nothing to do with paying the employees of the defendant.

Thornton testified that he was in the employ of the defendant, as the dock-master in charge of the Grand Junction Wharf ; that he attended to the docking of the vessels as they arrived ; that he had nothing to do with employing the shovellers ; that with regard to the stage-men, in the interest of forwarding the work along, he saw that they got their orders to go ahead and put out the coal ; that if there was any delay they were to report to him ; that he had nothing to do with the original employment of them, or with getting or selecting the men ; that it was the business of the stevedores to attend to the selection of the men ; that he never hired Gallagher, and never discharged him ; and that he never hired a new man, but sometimes told them that, if they could not settle it themselves, he would get a new man.

Evidence was also introduced tending to show that the fall which broke had been in use for six or seven months ; that one Carey, who was in the defendant's employ as an assistant to Thornton, had charge of the ropes, and of fitting, repairing, splicing, and replacing them when necessary ; that Carey kept other falls, which were sound and strong, on the wharf ready for use, and accessible to the gang ; that each gang had its own fall ; that it was the duty of Gallagher to ask Thornton for another fall if he considered the rope in use to be unsafe and dangerous, and likely to break ; that it would have been evident to any one on examination that the fall which broke would break, and was not fit for use ; and that after the accident a new rope was put in.

The defendant requested the judge to rule and instruct the jury that, "1. Upon the evidence the plaintiff cannot recover in either action. 2. There is no evidence of any authority from the defendant to Thornton to employ men as shovellers. 3. Upon the evidence the work of unloading coal from the schooner John H. Kranz was not a railroad operation. . . . 5. If there was another rope or fall accessible to Gallagher, or which he could have had by inquiring for it, and it was his duty to get it or ask for it upon his discovering the weakness of the one in use, and

he negligently omitted to do so, and went to work, and by reason of the omission the accident occurred, the plaintiff cannot recover in either action."

The judge refused so to rule, and instructed them, among other things, that it was for the jury to consider and determine "whether or not this gang of men who were discharging this schooner, the John H. Kranz, were, when they were discharging this cargo, in the employ of the defendant corporation, or in the employ of the schooner"; that "if the schooner undertook the discharge of the cargo, employed the men, hired the engine and the engineer, and took control of them, then it is its discharging; if, on the other hand, the defendant corporation hired the men, and they took for convenience, or for any other reason, the discharge of this cargo upon themselves, and were paid for it by the schooner, then it is their act"; that "if these men were at work for the defendant corporation in taking coal from the schooner and putting it on to the wharf, or into the cars, then they were engaged in the business of the corporation"; that it was a question for them whether or not it was a case "where it was the duty of the workmen — that is, of the gang — the duty of this gang to see to it that this was a suitable and proper fall, and in case of its not being one, to go and get another"; and concluded as follows: "As I said in the first place, if these men were not in the employ of the defendant corporation, but were in the employ of the schooner, hired by the schooner; — and when I say 'hired by the schooner,' I don't mean through the Boston and Albany Railroad; because if the Boston and Albany Railroad has these men, and goes there and does the work with these men, and is paid for it, why, they are then in the employ of the Boston and Albany Railroad Company. If, on the other hand, the Boston and Albany Railroad did not hire those men, and they are at work for the schooner, then they are in the employ of the schooner, and the corporation is not responsible for them, and not liable in this action."

The defendant thereupon objected to the above instructions, and the judge further instructed the jury, that, "if the Boston and Albany Railroad Company hired these men, if they were in their employ, and, being in their employ, they put them at work there to discharge this cargo, and, as their servants, they dis-

charged this cargo, then they would be the servants of the defendant corporation; and I also rule that, taking this to do and doing that, in doing that they would be engaged in the business of the corporation"; that, "if the Boston and Albany Railroad had these men to let, and this schooner went there and hired these men of the company, made a contract for these men, and took these men there as their own men, and in their employ, in the employ of the schooner, that would be sufficient to show these men to be in the employ of the defendant; but it must appear that these men were in the employ of the Boston and Albany Railroad Company, in the performance of their work in the discharging of this coal, — that is, that this coal was discharged by the Boston and Albany Railroad Company, and not discharged by the schooner"; and that "where there is used such kind of appliances that from time to time it is necessary to supply a part or a portion, and the material for that supply is provided by the corporation, if it is the duty of the men who are employed, or either of the gang, — Gallagher, or either of them, — if it is their duty in the gang, or if it is the duty of either of them, to get and replace these themselves, then of course they cannot recover, because it would be a failure to perform their duty, or the failure on the part of a fellow servant to perform his duty. And I left it to you to say, under all the testimony here, whether or not this was the duty of the gang, or whether it was the duty of the defendant corporation to supply this fall, and reasonably to look after it and see that it was in a reasonably safe and proper condition for use."

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

Samuel Hoar, for the defendant. 1. It is submitted that Gallagher was a stevedore, and that he was "exercising a distinct business, under an entire contract, for a gross sum," and that the relation between the gang and the defendant was that of contractor and contractee. *Linton v. Smith*, 8 Gray, 147. *Forsyth v. Hooper*, 11 Allen, 419. *Murray v. Currie*, L. R. 6 C. P. 24.

2. The plaintiff must show, not only that the injury was the result of the negligence of the defendant, but that it was the result "of the negligence or carelessness of a corporation operating a railroad." Pub. Sts. c. 112, § 212. The business of unloading vessels is that of stevedores, and not of railroad cor-

porations, and the negligence alleged was not that of a corporation operating a railroad. *Claxton v. Lexington & Big Sandy Railroad*, 13 Bush, 636.

3. A corporation must act through its servants and agents, and perform its whole duty by furnishing sufficient materials, and selecting competent persons to keep its machinery and appliances in a safe condition. Where a defect calls for repair of a permanent character, the master cannot free himself from responsibility by delegating his duty to a servant, but must see that he performs that duty. *Ford v. Fitchburg Railroad*, 110 Mass. 240. *Holden v. Fitchburg Railroad*, 129 Mass. 268. *Rogers v. Ludlow Manuf. Co.* 144 Mass. 198. But the making of such ordinary repairs as the use of the machine requires to keep it in order from day to day may be intrusted to servants; and, by employing competent servants for that purpose, and supplying them with suitable means, the master performs his duty. *McGee v. Boston Cordage Co.* 139 Mass. 445, 448. *Rice v. King Philip Mills*, 144 Mass. 229, 236. In a case precisely similar to the case at bar, it was held that a defect identical with that here in question comes within the latter class. *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209.

It is clear that the defendant had performed its whole duty to the intestate, — had supplied suitable materials, and employed competent men to make the repairs necessary. *King v. Boston & Worcester Railroad*, 9 Cush. 112. *Zeigler v. Day*, 123 Mass. 152. *Smith v. Lowell Manuf. Co.* 124 Mass. 114. *McDermott v. Boston*, 133 Mass. 349. *Loughlin v. State*, 105 N. Y. 159.

4. The fifth request for instructions ought to have been given as requested. If the jury should find that it was the duty of Carey or Thornton "to get and replace" the new fall, on being notified by Gallagher, or any one else, of the necessity for so doing, they would be fellow servants of the plaintiff's intestate, precisely as Gallagher would have been if it were his duty, and the plaintiff could not recover for negligence on the part of Carey or Thornton in that case. Yet, under the instructions given, the jury must find for the plaintiff, if the duty of getting and replacing was not on the members of the gang, even though Thornton or Carey, having the duty of getting and replacing, were free from negligence.

J. B. Richardson, for the plaintiff.

DEVENS, J. This bill of exceptions was taken in both cases, which were tried together. As the cases were tried, the first action was to recover damages for the loss of life of Thomas Daley, the plaintiff's intestate, by his administrator, for the use of his children, Daley leaving no widow; the second action was to recover damages for the suffering of Daley previous to his decease.

The fundamental question was, whether the plaintiff's intestate, when the injury occurred, was an employee of the defendant. That it was the duty of the schooner to place the coal on the wharf of the defendant, and to bear the expense thereof, was admitted; it is also equally clear, that the work of loading it into its cars belonged to the defendant. The two operations were performed as one, although successively; the coal as it was hoisted from the schooner being put into the barrows of the defendant to be carried to its cars. The engine and all the apparatus used belonged to the defendant, and the engineer was its servant. The dock-master of the defendant, one Thornton, had the general direction and control of its wharves at East Boston, and was assisted by one Carey. He assigned the berths to the schooners as they arrived; he employed the foreman of the gang (known as the stage-man), who unloaded the schooner, and who was also paid by the defendant, and gave him directions when to proceed and put out the coal. If there were any delay in the work, it was the duty of the stage-man to report to him. There was also evidence that the schooner paid twenty-five cents a ton for discharging the cargo to the defendant's local cashier, who retained for the defendant a certain portion for the use of its apparatus, and delivered another to the foreman of the gang which unloaded the vessel, who divided it among the men. The work of unloading the schooner John H. Kranz, in the course of which Daley was injured, proceeded in this way.

The defendant asked the court to instruct the jury that there was no evidence of any authority from the defendant to Thornton to employ men as shovellers. This should not have been given. There was evidence of a general authority on his part as to the unloading, from which such authority might be inferred, and it was also immaterial whether the men were employed by Thornton, or by some one else, entitled to act for the defendant. The material question was, whether these men were actually in

the employ of the defendant corporation. If the corporation was actually doing the work of unloading the vessel, having charge and direction of it through its upper servants, authorized to control the laborers engaged in it, and was also receiving pay from the party bound to bear the expense of it, those engaged in it were its servants. It cannot make any difference whether the men employed were hired by it for the month or year, or job, or whether they received a fixed sum, or a portion of the sum received by the defendant from the schooner, if they were entitled to look to the defendant, and not to the schooner, for their compensation. The instructions were in accordance with this, and there was certainly evidence (although upon this point there was conflict) that Thornton employed other men than Gallagher, the foreman or stage-man; that he discharged the whole "gang," as it was termed, of shovellers at a time previous, and afterwards took them back; that he refused employment to some men; that he had control of the run or platform; and that he directed men when to go on and when to stop work.

The defendant contends that the evidence, if anything, showed a relation of contractor and contractee between the gang and the defendant, and that such should have been the ruling. This position does not appear to have been taken at the trial, nor did the defendant desire to have the inquiry submitted to the jury, whether the laborers were not independent contractors, performing a particular job contracted for by their foreman. If it had been so submitted, the evidence that the engineer and stage-man were directly hired by Thornton, and in a general way directed by him, together with the other evidence above recited, would fully have justified a finding that the relation of master and servant existed between the defendant and the laborers. The answer to the inquiry whether Daley and the gang of laborers were the servants of the defendant, depended upon numerous circumstances, more or less disputed and complicated, and was properly left as a question of fact to be decided by the jury.

The defendant further contends, that, as the business of unloading vessels is a business distinct from that of operating a railroad, even if the injury was the result of the negligence of the defendant, it cannot be held to be the result "of the negligence or carelessness of a corporation operating a railroad." Pub. Sts.

c. 112, § 212. St. 1883, c. 243. The Pub. Sts. c. 112, § 212, provide that, when the life of a passenger, or of a person being in the exercise of due diligence and not a passenger nor in the employment of such corporation, is lost "by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness, or gross negligence, or carelessness of its servants or agents while employed in its business," not less than \$500, nor more than \$5,000, may be recovered by indictment to the use of certain persons named. The second clause of the same section provides that, "if the corporation is a railroad corporation, it shall also be liable in damages," not exceeding \$5,000, nor less than \$500, in an action of tort, to the executor or administrator to the use of the same persons specified in the indictment. It is provided that only one of these remedies can be availed of. The St. of 1883, c. 243, amends this section by inserting after the provision as to an indictment, "and if an employee of such corporation, being in the exercise of due care, is killed under such circumstances as would have entitled the deceased to maintain an action for damages against such corporation, if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employee." The words "operating a railroad," in the Pub. Sts. c. 112, § 212, describe the kind of corporation intended to be subjected to the liability there imposed, and not the work immediately in the process of performance by it. Even if they could be held to limit the liability to occasions where the railroads are being actually operated, they would not limit it to accidents occasioned by locomotives, moving trains, etc., or only upon its tracks. The handling of its freight, the loading and unloading of its cars, or the transfer, as in the case at bar, of freight from a vessel to its cars, are railroad operations.

The defendant further urges, that it is clearly shown that the defendant discharged his whole duty to the plaintiff's intestate, and that there was no evidence of negligence on the part of the defendant which could properly be submitted to a jury. This argument is upon the theory, that the only contention that could have been made by the plaintiff was that the defendant was negligent in not supplying a suitable and safe fall, and that as to that matter the defendant did its whole duty. It is the duty of

the master to exercise ordinary care in supplying and maintaining machinery, appliances, and instrumentalities; and if the servant exercising ordinary care is injured by a deficiency therein, he is entitled to recover damages. The servant charged with providing these appliances stands in the place of the master, and performs the duty incumbent on him. It is not sufficient that he is an intelligent and competent servant; if he neglects this, the master is still responsible, unless he shall himself have exercised a reasonable care and supervision over him in seeing that the machinery was in proper condition. Nor is it enough that the master has employed suitable servants, and furnished them with suitable materials, and instructed them to keep the machinery in repair. He must see that such servants do their duty. *Elmer v. Locke*, 185 Mass. 575. *Rogers v. Ludlow Manuf. Co.* 144 Mass. 198. The making of such ordinary repairs as the machine requires from day to day, and which are intended to be done as a part of its operation by those engaged in running the machine, may be intrusted to them, or to some among them; and if the master employs competent servants for that purpose, and supplies them with suitable means, the master performs his duty. Such servants are fellow servants with those employed only to use the machine. *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209. *McGee v. Boston Cordage Co.* 139 Mass. 445.

The injury in the case at bar occurred, not from the careless handling or management of the fall, but from the defective character of the rope used. There was ample evidence that it was the duty of Carey, who was the assistant of Thornton, to repair, splice, and fit the ropes used. Each gang of men had its own fall. The defendant has argued, that, even if it was the fault of Carey or Thornton that a defective rope was used, it was the negligence of a fellow servant, who was provided with suitable material, (as there was an additional fall at his disposal,) and who was himself a competent man. We do not perceive that the defendant took the position at the trial that Daley, the deceased, was a fellow servant of Carey or Thornton. It relied on the fact that Gallagher might have got a new fall by asking for it, and that, as he or the gang of which he was foreman did not ask for it, the plaintiff could not recover. Its fourth request was: "If there was another rope or fall accessible to Gal-

lagher, or which he could have had by inquiring for it, and it was his duty to get it or ask for it upon his discovering the weakness of the one in use, and he negligently omitted to do so, and went to work, and by reason of the omission the accident occurred, the plaintiff cannot recover in either action."

The judge, in his charge, submitted to the jury the inquiry whether, as the workmen were employed, it was their duty, if the rope became apparently weak, or gave out, to go and get a new one to replace the old one, and whether such had been provided at a convenient place by the defendant, or whether it was the duty of the defendant corporation to see that a proper rope was provided. He also, in answer to the objection of the defendant to the part of the charge relating to the inquiry whether it was the duty of the men to see that the rope was a proper one, and, if not, to get another, restated the general principle with regard to men in the employ of another in these words: "Where there is used such kind of appliances that from time to time it is necessary to supply a part or a portion, and the material for that supply is provided by the corporation, if it is the duty of the men who are employed, or either of the gang, — Gallagher, or either of them, — if it is their duty in the gang, or if it is the duty of either of them, to get and replace these themselves, then of course they cannot recover, because it would be a failure to perform their duty, or the failure on the part of a fellow servant to perform his duty. And I left it to you to say, under all the testimony here, whether or not this was the duty of the gang, or whether it was the duty of the defendant corporation to supply this fall, and to reasonably look after it, and see that it was in a reasonably safe and proper condition for use." To which the defendant excepted.

We do not see why the request of the defendant was not substantially complied with. Both the request and the instruction, assuming that the fall was defective, place the responsibility on the gang, if it was the duty of Gallagher or the gang to replace it or see that it was replaced, and the means of replacing had been provided by the corporation. The request is, that if the rope or fall was accessible, and Gallagher could have had it by inquiring for it, and it was his duty to get it or ask for it on discovering, etc., then the plaintiff cannot recover. The instruction

does not use the words "ask for it," but it clearly denies to the plaintiff the right to recover, if the duty of seeing that the rope was sound, and if not sound of replacing it, rested upon Gallagher or either of the gang, and the means were accessible.

The defendant urges that the instruction given was erroneous on this point, because it says, "If the jury should find that it was the duty of Carey or Thornton to" get and replace "the new fall, on being notified by Gallagher or any one else of the necessity for so doing, they would be fellow servants of the plaintiff's intestate, precisely as Gallagher would have been if it were his duty, and the plaintiff could not recover for negligence on the part of Carey and Thornton in that case." This is not a sound argument. The instruction requested and that given dealt only with the duty of the gang or its foreman, on the one side, and the corporation on the other. The judge did not undertake to define what were the relations of Carey and Thornton, and to what extent the corporation would be responsible for their acts or neglect. The defendant had requested no instruction upon the theory that Carey or Thornton, if they had neglected their duty, — it being their duty to see to it that the fall was in good condition, — were still fellow servants of the plaintiff, and therefore that he could not recover. It contends that, under the instructions given, the jury must find for the plaintiff, if the duty of getting and replacing the rope was not on the gang, even though, having the duty of getting and replacing, Thornton and Carey were free from negligence. Nothing of this sort is said by the presiding judge. The case was, without doubt, tried on the theory, of which there is ample evidence disclosed by the exceptions, that there was great negligence on the part of some one in permitting a gang of men to go to work provided with so wretched a rope, and that this negligence was either the fault of Gallagher, who had the immediate control of the work of the laborers, and directed the actual performance of the work, or of the servants of the defendant, Carey and Thornton, who had no share in the actual work, but through whom the appliances and instrumentalities for the work were supplied. If it was the fault of the latter, the defendant does not appear to have controverted its responsibility. If the defendant had desired instructions as to the responsibility of the defendant

for Carey and Thornton, they should have been asked. Nor does it appear that instructions on this subject were not given by the presiding judge, as only so much of his charge is reported as relates to the exceptions taken.

The instructions given, in answer to the fifth request of the defendant, were sufficiently favorable to the defendant. Whether, if Gallagher had been guilty of neglect in seeing to it that the rope was sufficient, and, observing that it was insufficient, in failing to get and replace it by another, this was to be considered the neglect of a fellow servant strictly, which would deprive the plaintiff of his right to recover, or of the master, who had intrusted the duty to Gallagher, it is not now necessary to discuss, in view of the instructions given.

In *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209, it was held that, where three men worked together on a small boat which was provided with a rope to replace that in actual use as it might become decayed, and one was the foreman "to superintend the labor of the men and the use and condition of the apparatus upon his boat," the negligence of such foreman was the neglect of a fellow servant. But there is a difference, and there may be a legal distinction between that case, where something is necessary to be done from time to time to keep a machine in working order, as by replacing a rope, and where the foreman is provided with, and has in his own control, the means of doing this, and one in which it is his duty to apply for and thus obtain the means of replacing a rotten rope. In the first it is a part of his duty, in working the machine, to stop it from time to time for the purpose of repairing it from the materials in his hands; but if he is only to get the materials by asking for them, even if it is made his duty to ask, the control of the repairs is with those who are to provide the machinery, rather than those who are to work it. It might be for them to determine whether the machine should be stopped and the repairs made, and the neglect of the foreman to report its condition might perhaps be treated rather as a neglect of the master, who is to provide suitable machinery, than of the servant, whose duty it is to handle it properly.

It was not contended that the plaintiff's intestate had any knowledge of the weakness of the rope. The facts, out of which

the duties of Gallagher and the gang, on the one side, and of Thornton, Carey, and the defendant, on the other, arose, were in dispute. What were those duties respectively depended on these facts, and under proper instructions it was for the jury to determine what those relations were. *Clark v. Soule*, 137 Mass. 380. Under the instructions as given, the jury must have decided that it was the duty of Carey and Thornton to see to it that there was a sufficient rope in the fall provided for the use of the gang to which the plaintiff's intestate belonged, and that the neglect so to do was that of the master.

Exceptions overruled.

FITCHBURG RAILROAD COMPANY vs. SAMUEL T. FROST.

Middlesex. March 15, 1888. — May 7, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, & HOLMES, JJ.

Railroad Crossing — Right of Way — Easement — Non-user — Grant — Reservation — Prescription.

Evidence that a railroad company from 1840, when its road was built, until 1850, maintained and planked a private crossing, that, in an agreement for a relocation of the road made in 1849, the company agreed with the adjoining owner of the fee to keep the crossing in repair "as now required," that a deed made by such owner in 1855 of the right to build over the new location provided that "any rights" of his in the crossing were not to be disturbed, — no planking being put down between 1850 and 1855 or thereafter, — and that such owner from 1840 to 1850 used the crossing for all purposes, and from the latter date till 1887 for foot passage only, will justify a finding, in an action by the company against such owner for removing a fence thereat, that he had a right of way at the crossing for foot purposes by grant, reservation, or prescription.

TORT for removing a fence at the crossing of Vine Street, a private way in Somerville, by the plaintiff's railroad. Trial in the Superior Court, without a jury, before *Pitman, J.*, who found for the defendant. The plaintiff alleged exceptions to a refusal of the judge to rule that there was not evidence sufficient to warrant a finding that the defendant had a right of way, as claimed by him, across the railroad at Vine Street. The evidence appears in the opinion.

G. A. Torrey, for the plaintiff.

G. A. Bruce, (*M. F. Farrell* with him,) for the defendant.

DEVENS, J. By the original location of the plaintiff's railroad, the defendant's farm was divided into two parts, and over the road as constructed there were in use three crossings, one of which was near certain works known as the Tube Works, and another of which was called Vine Street. The road was constructed in 1840, and the tracks were removed about three hundred feet farther south in 1850, under an agreement made in 1849, between the plaintiff and the defendant, that the defendant would convey to the plaintiff the right to maintain its road over the more southerly strip of land, "the said company to have the same rights in and to said strip of land as if the railroad of said company had been originally located over the same, and no other." When thus completed, the strip of land over which the railroad was first located was to be released to the defendant. Vine Street, which was laid out by the defendant in 1840 as a passageway or private street, extended across the tracks of the railroad as originally located, and also over those of the new location. At a point where Vine Street crosses the present tracks of the plaintiff, a fence was erected by the plaintiff in 1887, which subsequently was removed by the defendant for the purpose of using his alleged right to cross. The exceptions raise simply the question whether there was any sufficient evidence that the defendant had a right of way across the plaintiff's railroad at the time of the alleged trespass which would warrant a finding in his favor.

The agreement of 1849 provided that "said company will make and keep in repair forever, for the accommodation of said Frost, the same number of crossings over the railroad to be built in pursuance of the agreement as they are now required to do over the railroad that is to be discontinued." The deed in pursuance of this agreement was not made until 1855, conveying the locus upon which the new track had been constructed as a strip of land sixty feet in width, which was to be "used for railroad purposes only," and to revert to the defendant if the railroad should be discontinued. By another clause in the deed, the defendant relinquished his right to the Tube Works crossing; it being, "however, fully understood that nothing herein

contained shall affect any rights of said Frost to any crossing to which he may be entitled besides the one hereby relinquished, which is situated near the Tube Works." All that the defendant conveyed was an easement by which plaintiff was authorized to construct a railroad over his land, and by the agreement of parties a right of way could be reserved to himself. *Boston Gas Light Co. v. Old Colony & Newport Railway*, 14 Allen, 441. *Eames v. Worcester & Nashua Railroad*, 105 Mass. 193. *Gay v. Boston & Albany Railroad*, 141 Mass. 407.

The argument of the plaintiff is, that by the agreement it was bound to keep in repair for the defendant the same number of crossings which it was then required to do, and that by the deed it is only provided that none of the existing rights of crossing, except that at the Tube Works which was relinquished, should be affected, and that no new rights were granted to the defendant. It is further urged that no evidence was offered of any existing right, and that proof that the defendant had actually crossed the original location for ten years without objection was no evidence of such then existing right. But the proof is much stronger than this. "It was in evidence," we quote from the exceptions, "that, from the construction of the said road in 1840 to the change of location in 1850, the Vine Street crossing had been maintained and planked by the railroad company." When it is shown that for ten years the plaintiff had itself maintained and planked a way over its road for the accommodation of Vine Street solely, so far as the evidence shows,—when the defendant had crossed there under a claim of right,—and when these facts are coupled with a reference to the defendant's rights of crossing in the agreement and deed,—there is sufficient evidence to sustain a finding that the defendant had there a right of way which had been previously granted or reserved to him. Nor do we perceive, because in the five years that intervened between 1850 and 1855, when the deed was given, there was no planking on the Vine Street crossing over the new tracks, that this conclusively shows, as the plaintiff contends, that there was no legal right to cross at this point when the deed was given.

The plaintiff further contends, that, if the defendant had a right to cross at the place in controversy, such right has been

lost by non-user and the failure to claim the same from 1850 to 1887; the defendant never having crossed since 1850 except on foot, and there being no preparation by planking which would have enabled him to use the crossing for teams. It is not important now to consider whether there is evidence that the defendant still preserves his right to use the crossing with teams. He has continued to use the Vine Street crossing on foot, and if he has lost by non-user a larger right which includes it, this cannot operate to deprive him of that which he has constantly asserted. It is, however, to be observed, that an easement acquired by grant is not ordinarily lost by non-user for twenty years or more, unless there has been a possession and use of the servient estate clearly inconsistent with and adverse to the easement. There certainly was no such possession and use so far as the right to cross on foot is concerned; and the fact that during these years the planking was not provided which was requisite for the passage of teams did not make a use inconsistent with this easement.

Again, upon the ground of prescription, the presiding judge was justified in finding that the defendant had acquired a right of way. While this presents a somewhat different question from that whether there was any express grant or reservation shown, the circumstances under which the agreement or deeds were made in connection with which the defendant asserted the right to cross are to be considered. Even if all that the defendant now claims is the right to cross on foot, the facts that there were preparations for his crossing by teams over the original track, and that the agreement and the deed recognized rights of crossing, are not without significance. That a right of way may be acquired by prescription to cross a railroad has been so recently decided that it would not be worth while to repeat the discussion. *Turner v. Fitchburg Railroad*, 145 Mass. 433.

The plaintiff urges that the evidence shows that the crossing on foot by the defendant, as well as all the other crossing by pedestrians, was permissive only; that it simply continued without objection from the time of the construction of the new tracks until the year 1887, when the plaintiff endeavored to check the annoyance by the erection of a fence; and that until that time

it could not be deemed adverse. Much more than a succession of casual and irregular trespasses is, however, shown by the defendant. His use began over the original track by a crossing prepared and maintained by the plaintiff, and the agreement and deed contemplate that he has rights of crossing over the original track, which are to continue over the new. "From 1840 to 1887," says the bill of exceptions, "the defendant had exercised the right of crossing said tracks over Vine Street under a claim of right for all purposes, without objection or interference by the plaintiff, but since the change in the location of the railroad had never crossed except on foot." These facts, of which the plaintiff could not have been ignorant, would justify a finding that a right of way, so far as crossing on foot was concerned, had been acquired by prescription.

Exceptions overruled.

BRADLEY L. EATON vs. NATHANIEL LITTLEFIELD.

Suffolk. March 16, 1888. — May 7, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Principal and Agent — Contract — Illegal Consideration — Insolvent Debtor — Evidence.

A creditor of an insolvent debtor guaranteed payment of part of another creditor's claim, upon the latter's agent agreeing, without his principal's knowledge or authority, to vote for a certain person as assignee; and the principal accepted the guaranty and brought an action thereon. *Held*, that the action could not be maintained.

At the trial the agent's power of attorney was excluded, there being no evidence that the defendant had seen it or knew of its contents, and evidence of how the plaintiff actually voted for assignee was admitted, the jury being instructed to disregard it as immaterial. *Held*, that the plaintiff had no ground of exception.

CONTRACT upon the following agreement in writing under seal, signed by the defendant: "Boston, October 12, 1883. I, Nathaniel Littlefield, of Boston, in consideration of one dollar and other valuable considerations, the receipt whereof is hereby acknowledged, hereby guarantee to James A. Wood, of Cam-

bridge, Mass., and Eaton Brothers, of Calais, Maine, that they shall receive at least ten per cent of their respective legal claims against Rice, Jones, and Hammond, within one year from the date of this agreement, and if said Wood and Eaton Brothers do not receive at least ten per cent, as aforesaid, I will pay to them the difference between what they shall receive and said ten per cent within the year, as aforesaid. But it is understood said claims are not sold, and that said Wood and Eaton Brothers are to receive any excess above said ten per cent which said estate of said Rice, Jones, and Hammond may pay, or said Rice, Jones, and Hammond may pay."

At the trial in the Superior Court, before *Blodgett, J.*, it appeared in evidence that the firm of Rice, Jones, and Hammond, of Boston, failed a short time before the date of the above agreement, and that the plaintiff, who did business under the name of Eaton Brothers, the defendant, and Wood were creditors of the firm; that the defendant and Wood, who claimed to act as the plaintiff's agent, had various negotiations in regard to the failure and the probable action of the plaintiff and Wood in relation thereto, the result of which was the execution of the agreement by the defendant and its delivery to Wood; that the consideration of the agreement was in whole or in part an undertaking by Wood, acting for himself and as the agent of the plaintiff, to vote for one John Warner as assignee in the event of proceedings under the insolvent laws of the Commonwealth by or against the firm; and that the firm went into insolvency in November, 1888, and paid less than ten per cent in dividends to creditors.

Wood testified, that in the negotiations with the defendant, and in the acceptance of the agreement, he acted as the agent of the plaintiff, but denied that there was any agreement whatever as to the plaintiff's vote for assignee, or that he ever told the plaintiff that there was such an agreement. There was no evidence that the plaintiff ever authorized, knew of, or ratified the alleged agreement as to the vote for assignee, except by receiving the instrument and by bringing this action thereon; and the plaintiff asked the judge to rule that he was entitled to recover, because there was no evidence that he authorized, knew of, or ratified the alleged illegal agreement. The judge declined so to rule, and the plaintiff excepted.

The plaintiff offered in evidence a power of attorney from himself to Wood, dated October 1, 1883, authorizing the latter to sign his name to a deed of assignment from Rice, Jones, and Hammond to Warner, and offered to prove that this power of attorney was the only authority of Wood to act in his behalf in the negotiations which resulted in the agreement; but the judge excluded it, and the plaintiff excepted. The plaintiff called as a witness the register of the Court of Insolvency, and the defendant, on cross-examination, was allowed, against the plaintiff's objection, to show that the plaintiff voted for Wood and Warner for assignees; and to this evidence the plaintiff excepted.

The judge instructed the jury that it was immaterial for whom the plaintiff voted as assignee, and gave other instructions, to which no objection was made. The jury found for the defendant; and the plaintiff alleged exceptions.

S. H. Tyng, for the plaintiff, contended, among other things, that, if the defence relied on was sustained, it must be held that an unauthorized illegal act has an effect denied to the unauthorized legal act of an agent. *Upton v. Suffolk County Mills*, 11 Cush. 586. *Cooley v. Perrine*, 12 Vroom, 322. See also *Blood v. French*, 9 Gray, 197; *Anderson v. Bruner*, 112 Mass. 14; *Thacher v. Pray*, 113 Mass. 291.

S. K. Hamilton, for the defendant.

DEVENS, J. An agreement, arrangement, or bargain by which a creditor of an insolvent debtor has received or is to receive any money, property, or consideration whatever, by which his vote for assignee may be affected, is illegal. The statute requires, using very ample and searching words for this purpose, that, in proving his claim, the creditor shall make oath that no such agreement, arrangement, or bargain exists, and, further, that no claim shall be allowed, unless these statements are found to be true. Pub. Sts. c. 157, § 29.

As the case at bar was submitted to the jury, they must have found that the agreement signed by the defendant was made upon the consideration that the plaintiff should vote for one John Warner for assignee of the firm of Rice, Jones, and Hammond, in case that firm should go into insolvency. By this agreement, which was under seal, the defendant guaranteed that the plaintiff should, within one year, receive ten per cent of his

legal claims against Rice, Jones, and Hammond, and promised to pay him the difference between what he actually should receive within that time and this amount. Had this agreement been made directly between the plaintiff and the defendant, it would hardly have been contended, we presume, that it could be enforced. *Tirrell v. Freeman*, 139 Mass. 297. It was, however, made between the defendant and one Wood, also a creditor of the insolvent firm, acting on his own behalf and as the agent of the plaintiff. There was no evidence that the plaintiff ever knew of or ratified the transaction, except by receiving and bringing suit on the instrument signed by the defendant, and the plaintiff asked the court to rule that he was entitled to recover, because it was not shown that he authorized the illegal agreement.

Where one as principal adopts the act of another, who has assumed to act as agent for him, he puts himself in the same position that he would occupy if he had originally invested the assumed agent with authority. As the act of the agent is treated as that of the principal, the latter cannot accept it so far as it is advantageous, and reject the infirmities attached to it or by which it may be affected. *Suit v. Woodhall*, 113 Mass. 391.

The plaintiff in the case at bar relies upon an agreement, the consideration of which was a contract made on his behalf by one assuming to act for him. He can do so only to the same extent that he might had he himself made the contract under similar circumstances. He is liable for the fraud or misrepresentations of his agent, or of him whom he accepts and recognizes as such, and should be affected by the consequences of the illegal acts of such agent when he seeks to avail himself of results which have been secured by means of them. He must accept or reject the transaction as it occurred, and is compelled to adopt the whole or none. *Coolidge v. Smith*, 129 Mass. 554. He is bound by the consequences which flow from the fact that an illegal contract was an element in the transaction, and tainted with illegality the subsequent promise founded on it, which he seeks to enforce.

The power of attorney which the plaintiff gave to Wood was properly excluded. There was no evidence that it was shown to the defendant, or that he had any knowledge of its contents. Nor, even if the defendant had known that Wood had no au-

thority to make the illegal contract that the plaintiff should vote for Warner as assignee, would that render the contract made upon that consideration one that the plaintiff could enforce.

If we assume that the evidence as to the way in which the plaintiff actually voted for assignee was wrongfully admitted, it can have done no harm. The jury were told to disregard it as immaterial, and it must be held that they followed the instructions of the presiding judge. *Exceptions overruled.*

SAMUEL T. SOPER & others vs. JEROME F. MANNING
& another.

Suffolk. March 27, 1888. — May 7, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Equity Jurisdiction — Equity Practice — Appeal.

This court has jurisdiction in equity to compel a person, who has in his possession a United States Treasury draft issued for the amount of an award by the Court of Commissioners of Alabama Claims for the "oil catch" of a vessel captured on the high seas by an insurgent cruiser, and payable to the "owners," to deliver the draft to such owners.

A bill in equity by such owners alleged that they were to distribute the proceeds of the draft among those entitled thereto; that the person who retained the draft and another claimed certain percentages of the amount thereof in payment of their services in obtaining the award under agreements averred to be champertous. A master found that the agreements were legal, and the final decree ordered the draft to be delivered up, and allowed the claimants their commissions, whereupon a motion was made that such commissions might be retained by the plaintiffs as damages for the detention of the draft. *Held*, that others beneficially entitled to the draft were not necessary parties plaintiff; that both the claimants were properly made parties defendant; and that the motion could not be granted.

The only question, upon an appeal from the final decree of a single justice of this court, sitting in equity, without a report of the evidence, is whether the decree was warranted by the allegations of the bill.

BILL IN EQUITY alleging that the plaintiffs were the "owners of the claims for the capture" of the schooner *Mermaid*, at the time of her capture on the high seas by an insurgent cruiser; that "judgment was rendered in the Court of Commissioners of

Alabama Claims, at Washington, D. C., for the oil catch of the said schooner *Mermaid*, that is, the value of the oil on board at the time of her capture, to be received and distributed by the said owners according to law among the respective parties entitled thereto in their due proportion in the sum of \$5,018.61"; that the Treasurer of the United States had sent to the defendant Manning a draft on the assistant United States Treasurer at Boston for the amount of the award, payable to the plaintiffs; that the defendant Manning claimed to have acted for the owners of seven sixteenths of the vessel in obtaining the award, and to be entitled to twelve and a half per cent of their portion of the award by virtue of certain agreements with them; that the other defendant, Francis A. Perry, claimed to have represented the owners of nine sixteenths of the vessel in obtaining the award, and to be entitled to twelve per cent of their proportion of the award by virtue of like agreements with them; that the defendant Manning claimed that the payment of his percentage of the award was a first lien on the draft; that the defendant Perry claimed a lien upon the draft in the possession of the defendant Manning for his percentage of the award; that the agreements alleged to have been made between the defendants and the plaintiffs were champertous and void; that the defendant Manning, though often requested, refused to deliver the draft to the plaintiffs; that if the agreements between the defendants and the plaintiffs were valid, the defendant Manning was entitled to \$274.47, and the defendant Perry to \$358.76; and that sums exceeding these amounts had been tendered to the defendants and paid into court.

The prayer of the bill was that the defendant Manning might be decreed to deliver the draft to the plaintiffs without the previous payment of any sum of money to him or to Perry; that it might be decreed what sums should be paid to Manning and Perry, if any, prior to the delivery of the draft to the plaintiffs; that Manning might be decreed to pay to the plaintiffs damages because of his delay in delivering the draft to them; and that the plaintiffs might be allowed costs.

The defendant Manning demurred to the bill for want of equity, for the reason that the plaintiffs had a plain, adequate, and complete remedy at law, for want of jurisdiction, for multi-

fariousness, for misjoinder of parties, for insufficiency of tender, and for lack of parties. *C. Allen, J.*, overruled the demurrer, and subsequently, at a hearing upon the pleadings and the report of a master, to whom the case was referred upon answers being filed by the defendants, and who did not report the evidence, made a decree that the defendant Manning deliver the draft to the plaintiffs; that they recover costs against the defendants; that the defendants should receive \$274.47 and \$358.76 respectively, after deducting costs out of a fund paid into court by the plaintiffs; and that the plaintiffs should have the residue of the fund. The defendant Manning appealed to the full court.

J. F. Manning, pro se.

N. W. Ladd, for the plaintiffs, moved that the decree be so far modified as to award to them the balance of the sum of \$274.47, after deducting the costs taxed against the defendant Manning, as compensation for the damages suffered by them from the detention of the draft.

DEVENS, J. The bill sets forth that the plaintiffs are the owners of the claims for the capture of the schooner *Mermaid*, during the late civil war, and that a judgment for the sum of \$5,018.61 was rendered in their favor in the Court of Commissioners of Alabama Claims, for the "oil catch" of the schooner, that is, the value of the oil on board of her at the time of capture, to be received and distributed by the said owners according to law among the respective parties entitled thereto in their due proportion; that the defendant Manning has received a Treasury draft for this sum on the Assistant Treasurer of the United States at Boston, payable to said owners, the plaintiffs. It further sets forth that Manning claims to have acted for the owners respectively of seven sixteenths of the schooner, and Francis A. Perry to have acted for the owners respectively of nine sixteenths thereof, in obtaining said judgment; that Manning alleges that he is entitled to twelve and a half per cent on seven sixteenths of the amount of the draft representing the judgment, by virtue of a contract made for the payment of this amount if the claim should be recovered; and that Perry alleges that he is entitled under and by virtue of a similar contract to twelve per cent on nine sixteenths thereof, and to a lien there-

for on the draft, which is in the hands and possession of Manning. The bill further alleges, that these are pretended agreements, which are champertous and void, but avers a willingness to pay them so far as the contracts under which they arise shall be found valid.

The defendant Manning has assigned numerous grounds of demurrer, the one principally relied on being that this court has no jurisdiction of this matter. His contention apparently is, that, as the original claim grew out of the capture of the *Mermaid* on the high seas by a cruiser of the insurgent States, the draft in controversy must be treated as if it were actually the cargo of oil and bone known as the "catch," for which the judgment was awarded; that this sum is the joint property in various proportions of the owners, the officers, and the crew of the *Mermaid*; and that, as this is a maritime contract, the respective or proportionate rights of all interested can only be settled in an admiralty court.

Rejecting the many facts which the defendant Manning has introduced into his brief, and confining ourselves to the bill, it would be sufficient to say that it does not appear therefrom that any other person than the plaintiffs have any right whatever in the proceeds of the capture. They aver themselves to be "the owners of the claims for the capture" of the *Mermaid*; for aught that appears, the officers and crew may either never have had any interest in the "catch," or may have parted with it to the plaintiffs.

But if this were otherwise, by virtue of the judgment rendered, the plaintiffs are entitled to the draft as owners of the vessel, which authorizes them to receive it and distribute its proceeds to the respective parties entitled thereto, in their due proportion. It affords Manning no excuse for detaining this draft, because, if the plaintiffs receive it, they are to take it charged with a trust for the benefit of other parties as for the officers or the crew of the vessel. The general property is that of the owners, even if others may have an interest in its proceeds. It was not necessary to make them parties to this bill. Nor, if a case was presented where it was necessary to determine in what proportions owners, officers, and crew were entitled to a fund, into which the "catch" had been transmuted, would

there be any difficulty in so doing in this court, or any necessity of resorting to an admiralty court. While peculiar remedies, differing in some respects from those in ordinary legal proceedings, there exist, yet the rights and liabilities growing out of maritime contracts are daily passed upon in courts of law and equity. If there are in fact any officers or crew who are entitled to any portion of the fund awarded to the plaintiffs, and they are in any danger of losing it, they are not remediless. It is not easy to see how they are in any safer position by permitting the draft to remain in the hands of Manning, who has obtained it only as the attorney of the owners.

The claims made respectively by Manning and Perry rendered a bill in equity the proper mode of adjusting their rights. The demurrer of the defendant Manning, which we have considered, having been overruled, he answered, and the facts have been found by a master; his report of the evidence is not before us, and there is, therefore, no question except whether the final decree from which Manning has appealed conforms to the allegations and prayers of the bill. It appears that it does thus conform. *Iasigi v. Chicago, Burlington, & Quincy Railroad*, 129 Mass. 46. *McConnell v. Kelley*, 138 Mass. 372.

The decree awards to Manning the sum of \$274.47, as the amount of the commissions justly due, the contract made with him having been found to be a legal one. It is not now contended to have been illegal, but the plaintiffs move that they may be decreed to be entitled to retain this sum (as reduced by the bill of costs which the decree entitled them to deduct) as compensation or damages for the detention of the draft by Manning. There is, however, no good ground for this, in view of the fact that the plaintiffs originally denied to him any right to the compensation under his contract to which the master has found him entitled.

Decree affirmed.

NATIONAL EXCHANGE BANK & others vs. EBEN SUTTON.

Essex. April 8, 1888. — May 7, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Assignment — Creditors — Trust.

A debtor conveyed a large portion of his real estate to his son, who thereupon signed an agreement, which, after reciting the financial embarrassment of the debtor, stated that the conveyance was "for the purpose of having the same applied in liquidation of his indebtedness, irrevocably, in such manner as I shall deem best, . . . and leaving the time and manner of the sale of said real estate fully at my discretion, and the same to be managed and sold without any interference of" the debtor, and provided for the payment to the debtor of any surplus from the proceeds of the real estate, after deducting the expenses and the amounts paid to creditors. *Held*, that no trust was created in favor of general creditors which could be enforced in equity.

BILL IN EQUITY, filed July 6, 1886, alleging that the plaintiffs were creditors of William Sutton, and had been since November 30, 1881; that on that date William Sutton, who was then the owner of valuable real estate in the county of Essex, conveyed to the defendant, without consideration, by a quitclaim deed duly recorded, all of his real estate in that county, with the exception of certain property referred to as conveyed by him to certain trustees by a deed duly recorded; and that the same day the defendant executed the following agreement:

"Know all men by these presents, that whereas my father, William Sutton, of Peabody, county of Essex and Commonwealth of Massachusetts, has become financially embarrassed, and has made a conveyance to me of all his real estate situate in the county of Essex, not otherwise disposed of, for the purpose of having the same applied in liquidation of his indebtedness, irrevocably, in such manner as I shall deem best, and with full and complete authority in me to settle with the creditors for such sum or sums, and at such time or times, as I shall deem best, and leaving the time and manner of the sale of said real estate fully at my discretion, and the same is to be managed and sold without any interference on the part of said William Sutton, his heirs or assigns.

"I, Eben Sutton, of North Andover, in said county of Essex, hereby agree with said William Sutton, his heirs and assigns, that after the sale of said real estate I will pay to said William Sutton, his heirs and assigns, any surplus that may be left from the proceeds of the sale of said real estate, after the amounts paid to the creditors of said William Sutton have been deducted from said sales, and all that may be hereafter paid, and all expenses that may be incurred in the care, management, and sale of said real estate, with interest on all sums paid over receipts from time to time on the indebtedness of said William Sutton, and all other expenses and moneys paid in the care, management, and sale of said real estate.

"It being distinctly understood and agreed that these presents shall not in any particular affect my right to manage and sell said real estate, and that the purchasers shall not in any way be responsible for the application of the proceeds of the sale of said real estate, or any part thereof."

The bill further alleged, that William Sutton died, testate, on April 18, 1882, and that an executor of his will was subsequently appointed; that his estate afterwards was declared insolvent, and the claims of the plaintiffs were duly allowed in the Probate Court; and that the estate, other than that conveyed to the defendant, was inconsiderable, and insufficient to pay a dividend on the claims proved against it.

The bill further alleged, that the defendant, by virtue of the conveyance to him and of his agreement, held the real estate conveyed to him and the proceeds thereof in trust for the use and benefit of William Sutton; that the defendant had, since the conveyance to him, sold and conveyed certain portions of such real estate; that the defendant had paid to some of the creditors of William Sutton the whole or a part of their respective claims out of the proceeds thereof; that the defendant had refused to pay to the plaintiffs their several claims, or any part thereof, though often requested so to do; and that the defendant denied he was under any obligation to the plaintiffs, and claimed to hold the proceeds of the real estate sold by him, and the remainder thereof not yet sold, as his own property, free from any trust.

The prayer of the bill was: 1. That the defendant might be

required to make full discovery as to how much money he had received from all sales made by him of such real estate, and as to his disposition thereof, and to account for the same. 2. That a trustee other than the defendant might be appointed to hold such real estate, and the proceeds thereof, for the use and benefit of the creditors of William Sutton, and that the defendant might be required to convey to such trustee all the real estate unsold, and the proceeds of what had been sold by him.

The defendant demurred to the bill for want of equity. Hearing on the bill and demurrer before *C. Allen, J.*, who reserved the case for the consideration of the full court.

G. Putnam & L. S. Tuckerman, for the defendant.

H. P. Moulton, for the plaintiffs. The conveyance to the defendant with the instrument executed by him, if not invalid on account of fraud, constituted, for the benefit of all assenting creditors of William Sutton, a trust which can be enforced in equity. *Ward v. Lewis*, 4 Pick. 518. *Pingree v. Comstock*, 18 Pick. 46. *New England Bank v. Lewis*, 8 Pick. 113. *Bouvé v. Cottle*, 143 Mass. 310. Voluntary assignments by a debtor in trust for the payment of debts are valid so far as assented to by creditors, and will protect the property or fund from attachment to the extent of the amount due to assenting creditors. *National Mechanics & Traders' Bank v. Eagle Sugar Refinery*, 109 Mass. 38. *May v. Wannemacher*, 111 Mass. 202. *Pierce v. O'Brien*, 129 Mass. 314. *Faulkner v. Hyman*, 142 Mass. 53. It is submitted that sufficient assent is shown in the act of bringing suit.

Authority is given by this instrument to the trustee to apply the proceeds of the real estate in liquidation of the grantor's indebtedness, in such manner as the trustee shall deem best, "with full and complete authority . . . to settle with the creditors for such sum or sums, and at such time or times," as the trustee shall deem best. This establishes a trust for the benefit of all the creditors, and discretion is given the trustee to pay them such sums as he shall see fit. The discretion here given is legal and reasonable, and will be under the control of a court of equity. *Benedict v. Huntington*, 32 N. Y. 219. *Mann v. Witbeck*, 17 Barb. 388. *Hollister v. Loud*, 2 Mich. 309. Similar assignments have been held valid in a large number of adjudicated cases. *Neally v. Ambrose*, 21 Pick. 185. *Hitchcock v. Cadmus*, 2 Barb.

381. *Whitney v. Krows*, 11 Barb. 198, 201. *Townsend v. Stearns*, 32 N. Y. 209. *Norton v. Kearney*, 10 Wis. 443. *Nye v. Van Huse*, 6 Mich. 329.

The effect of the whole instrument is to give the assignee control over the assets of the debtor, and invest him with such discretionary power as he may lawfully use for the benefit of all the creditors, without interference or control on the part of the grantor.

DEVENS, J. The bill of the plaintiffs proceeds upon the ground that the conveyance made by William Sutton was a conveyance to the defendant, Eben Sutton, of his real estate, or a certain portion thereof, which, having proper regard to the rights of his creditors, he might properly make, and that the agreement made contemporaneously by the defendant with William Sutton is one which it is his duty to perform. They do not seek to invalidate the conveyance as voidable by creditors, or as for any reason fraudulent, nor to place themselves in such a position as they would occupy if, for the purpose of impeaching its validity, they had at law attached the property.

As creditors, they seek the benefit of the trust, which, they contend, the defendant assumed in favor of all the creditors, and having assented to it by bringing this bill, they claim to have it enforced in their favor by directions under the bill to Eben Sutton, or through his removal as trustee. Nor is their bill framed upon any alternative by which, in case the court should be of the opinion that no trust was created in favor of the general creditors, such facts are averred that the conveyance to Eben Sutton can be declared fraudulent and illegal as against them, and the defendant held responsible to them for the property he has received, or which he still holds, belonging originally to William Sutton.

The position of the plaintiffs submits, as the only inquiry, whether the conveyance was a general assignment for the benefit of all the creditors of William Sutton who might desire to avail themselves of it, or whether the conveyance was simply upon the trust that the defendant should apply the net proceeds of the estate conveyed to him to the payment or settlement of such of the debts of William Sutton as he should see fit, and upon such terms and at such times as he should see fit to pay or settle the

same, returning to William Sutton any surplus which might exist after such payments or settlements, the whole administration of the property for these objects thus being left to the defendant, acting according to his own discretion.

The language of the defendant's agreement, after the statement that William Sutton, having become financially embarrassed, has conveyed to him all his real estate in the county of Essex, not otherwise disposed of, is as follows: "For the purpose of having the same applied in liquidation of his indebtedness, irrevocably, in such manner as I shall deem best, and with full and complete authority in me to settle with the creditors for such sum or sums, and at such time or times, as I shall deem best, and leaving the time and manner of the sale of said real estate fully at my discretion, and the same is to be managed and sold without any interference on the part of said William Sutton, his heirs or assigns." In a subsequent clause the defendant agrees to return to William Sutton any surplus from the proceeds of said real estate, after the amounts paid to the creditors of William Sutton and the expenses have been deducted therefrom.

We have no occasion to consider whether, if the words "for the purpose of having the same applied in liquidation of his indebtedness" stood alone, they might be construed as imposing a trust which would render it the duty of the defendant to proceed to convert the real estate conveyed, with reasonable promptitude, into money, and to distribute the proceeds thereof ratably among all the creditors of William Sutton. They are qualified by the words which follow them. Those words indicate that the property was put by the debtor into the hands of the defendant to enable him to negotiate and to effect settlements with William Sutton's creditors as he best could, and it might be on terms more favorable to William Sutton than he himself could expect to obtain; perhaps also to prefer those whom the debtor desired especially to benefit.

The discretion given to the defendant is absolute, and of a character such that an honest exercise of it cannot be controlled by the direction of the court. The amount to be repaid to William Sutton is not that which remains after paying all his debts, but that which remains after what the defendant may have paid to creditors. The agreement leaves the defendant to

proceed with the payment or settlement with creditors, so long as he may feel disposed, but imposes no duty upon him to dispose of the whole property or any specific portion in effecting this object. How large a portion of the property of William Sutton the real estate undisposed of in Essex County constituted, does not appear distinctly, although it is averred that what remained in his hands after the conveyance was inconsiderable. This fact is unimportant in the aspect in which the case is now presented.

That William Sutton had full confidence that the defendant would use this property to the best advantage in extricating him from his embarrassments, is no doubt true; but there is nothing to show that he expected him to do it by a ratable distribution among his creditors, when the whole language of the agreement is taken into consideration, but rather the reverse. The authority given to the defendant "to settle with the creditors for such sum or sums, and at such time or times," as the trustee shall deem best, indicates that the division of the property was not to be ratable, but upon a different basis, having regard to all those exigencies which control in matters of negotiation.

We are therefore of opinion that no trust was created for the benefit of all the creditors by the conveyance to the defendant, so as to entitle them to a ratable division which could be enforced in equity.

Bill dismissed.

CHARLES H. HEINLEIN *vs.* BOSTON AND PROVIDENCE
RAILROAD COMPANY.

Suffolk. March 6, 1888. — May 8, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, & C. ALLEN, JJ.

Personal Injuries — Railroad Premises — Licensee — Trespasser.

If a person enters a railroad station in the evening to take a train, and, after finding that the last train has gone, remains therein for his own convenience several minutes longer, during which the station-master, the usual closing time having arrived, puts out the lights, he becomes at most a mere licensee, and cannot recover for injuries sustained in leaving the station by reason of the extinguishment of the lights.

TORT for personal injuries sustained by the plaintiff at the defendant's station in Roxbury.

At the trial in the Superior Court, before *Bacon, J.*, evidence was introduced tending to prove that on the evening of October 12, 1885, the plaintiff, at about eleven o'clock P. M., in company with his cousins, Emil Seiffert and Charles H. Heinlein, started for the Roxbury station, the plaintiff intending to take the last train on the defendant's road into Boston at 10.45 P. M.; that the Roxbury station is situated between Tremont Street and the railroad, doors opening out upon the street and upon a platform along the tracks; that the plaintiff relied on Seiffert, who was familiar with the trains; that they entered the men's waiting-room of the station, and found the station agent there clearing up the station; that they asked him no questions about the train; that after being there about two minutes Seiffert told the plaintiff that the train had gone, and that he would have to take a horse car; that they stayed in the waiting-room several minutes after finding out that the last train had gone, and then started to go out of the door leading to Tremont Street, but found it locked, and turned round to go out of the door leading to the platform; that of the lights in the station one was in the ticket office, which adjoined the waiting-room and had a bay window projecting into the platform; that the light in the ticket office was inside of the bay window, and when burning lighted the door and a step between it and the platform; that the only other light in the waiting-room was opposite the door leading to the platform, which threw some light on the step when the door was open; that while the plaintiff was crossing the waiting-room to go out of the door to the platform, the station agent, without any warning, suddenly extinguished the light in the ticket office and the remaining light in the waiting-room; that an electric lamp brightly lighted the platform, but the step was in the deep shadow of the projecting bay window; and that the plaintiff's heel caught on the step, which he did not see on account of the shadow, as he stepped out from the door, and he fell forward and against a train of the defendant's then passing the station, and received the injuries alleged; and that the defendant's servant at the station gave him no warning of the coming train.

The plaintiff testified, on direct examination, that he went to the Roxbury station to take the train into Boston; that he there found that the last train had gone; that he then waited around there "for a minute or two" before he started to leave the station, as above described, and was injured. On cross-examination, he testified that it was "three minutes, or something like that," before it occurred to him that the train had gone, during which he did not ask the station agent when the train was coming along; that he "stayed there three or four minutes" after he was told that he was too late for the train; that "I was waiting for a horse car after I found the train had gone, I did not go there for a horse car"; and that in going out of the door he did not see the step, but in trying to step over the shadow he tripped and fell.

Charles H. Heinlein, the cousin of the plaintiff, testified that, when they went into the station, "My cousin Emil looked around, I supposed looking for a clock. He told us that the train had gone, so he said we would have to wait; then the only way my cousin could get in was to take the horse cars. So we thought we could wait in the depot until one came along."

On the above facts the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

N. U. Walker, for the plaintiff.

G. Putnam & T. Russell, for the defendant.

DEVENS, J. The plaintiff entered the waiting-room of the defendant's station in Roxbury, intending to take the last evening train for Boston, for which one of two friends who accompanied him had informed him he was in time. In fact, it had been gone some fifteen minutes. With his friends, the plaintiff remained "three minutes, or something like that," as he stated on cross-examination, or "about two minutes," as other witnesses stated, in conversation with them. The station agent was there clearing up the station, but no inquiries were made of him or any one on the subject of the train. At the end of this time, the plaintiff was informed by his friend that the last train to Boston had gone, and that he would have to take a horse car. He waited "a minute or two," as he states in his examination in chief, or "three or four minutes," as he states in his cross-examination, in the defendant's station. He further testified:

"I was waiting for a horse car after I found the train had gone; I did not go there for a horse car." One of those who accompanied him states that, after being informed that the only way the plaintiff could get in to Boston "was to take the horse cars," adds, "We thought we could wait in the depot until one came along." At the expiration of the time which the plaintiff had waited, after being informed that the last train had gone, whether it was "one or two minutes," or whether it was "three or four," he determined to leave the station. He then found that the door leading to the street, by which he had entered, was locked, and he crossed the waiting-room to go out by the door leading to the platform. At this time, the lights in the ticket office and waiting-room were extinguished, by which some light was thrown upon the door or step leading to the platform, which platform was then lighted by an electric light which left the step in shadow. There was evidence that the plaintiff was injured by reason of the insufficient light on this step. Whether there was sufficient evidence that he was in the exercise of due care, as he stepped out towards the platform, was in dispute.

It is the contention of the plaintiff, that he was on the premises at the invitation of the defendant, and that the company was bound to see that its premises were in such condition, in all respects, that such a person, in the exercise of ordinary care, could leave them without injury, and that this extends to and embraces proper and suitable platforms, steps, and walks, as well as suitable lights. The only obligation that the defendant could have been under to the plaintiff was that which it owed to one intending to become a passenger in one of its trains, who would have a right to use the waiting-room for a reasonable time before the arrival of the expected train, or to one who sought information as to the time of departure or arrival of trains in which he was interested. Admitting that as to such persons there was a duty such as is claimed by the plaintiff owing from the defendant, by reason of an implied invitation on its part to enter the waiting-room in which the ticket office was situated, and without discussing whether, in view of the fact that there was to be no train such as he desired, and that he remained for two or three minutes without making any inquiry, the plaintiff could, up to the time that he was informed that there was no

train such as he desired, be held to have the rights of an intending passenger, or of a person seeking information, we are of opinion that after that time he had no such rights, if he continued to remain in the station after he had full opportunity to leave it.

While the defendant could, of course, do him no wanton injury, it had a right to conduct its business in the ordinary way, without regard to his comfort or convenience. When he arrived, he found the station-master clearing up the station, the time for closing it had arrived, and, if the plaintiff saw fit to linger, the defendant's servants had a right to proceed to close the station and extinguish the lights. There was ample time for him to have retired while the light in the waiting-room was burning. This room was not a place where every one might resort and use it for his own business, and he could not expect that it, or the way out of it, would be kept lighted until the arrival of the horse car for which, as he states, he waited. Whether, after he knew that there was no railroad train for him, he is to be considered a trespasser or a mere licensee, is not important. He could have no higher character than the latter. There was no allurement or inducement held out for him to remain, and if he did so, it was at his own risk. In order that it may be held that, thereafter, the defendant owed any duty to him, it should be shown, not merely that it or its servant acquiesced in his remaining, and permitted it when his only possible business had been concluded, but that it was in accordance with their invitation, or with the intention and design with which the waiting-room was prepared to be used. Of this there was no evidence.

The plaintiff urges that the inquiry should have been submitted to the jury, as a question of fact, whether he remained an unreasonable time, or for an unauthorized purpose. On the plaintiff's own statement, three or four minutes elapsed before the light in the station was put out, and during this time he had remained for his own convenience. Upon these facts a verdict that he had remained only a reasonable time, or for an authorized purpose, would not have been justified. Nothing was shown to have been done wilfully or wantonly to the injury of the plaintiff, and upon these facts the presiding judge properly ruled that he was not entitled to recover.

In this view of the case, it is unnecessary to inquire whether there was sufficient evidence that the plaintiff himself was in the exercise of due care in the manner in which he left the station.

Exceptions overruled.

CHARLES O. STREETER vs. ALDEN D. ILSLEY & another.

Middlesex. March 9, 1888. — May 8, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Landlord and Tenant — Assignee of Landlord — Denial of Title —
Estoppel — Estate at Will — Burden of Proof.*

A tenant is estopped to deny the title of his landlord's assignee to the same extent as that of the landlord.

The burden is on a tenant at will, who denies that his landlord's written lease to another terminates his estate, to prove that such lease conveys either no estate at all, or one not greater than the estate at will.

ACTION on the Pub. Sts. c. 175, to recover possession of a parcel of land in Lowell. At the trial in the Superior Court, before Pitman, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, the substance of which appears in the opinion.

A. G. Lamson, for the defendants.

G. A. A. Pevey, for the plaintiff.

DEVENS, J. The defendants were tenants at will of one Kingsley and one Woodward, paying them a monthly rent for the premises occupied. The defendants neglected for some months to pay the rent agreed, and Kingsley and Woodward made a written lease of the premises, under seal, to the plaintiff, who gave written notice of that fact to the defendants, requiring them to remove from the premises within a time specified, which was admitted to be reasonable. At the expiration of the time, this summary process was brought by the tenant to compel the defendants to surrender the premises. At the trial, the defendants requested, in various forms, the court to rule, that if a written and sealed lease for one year from their former landlord to the plaintiff was

relied on as terminating the estate at will of the defendants, it must be affirmatively proved by the plaintiff that the title of such landlord was of such a character as to be susceptible of alienation, and that there was no presumption that the landlord's title was of that character. The defendants conceded that, if the landlord's title was such that he could make a valid written lease, it would operate to destroy their estate at will, but contended that the burden of proof was upon the plaintiff to show this.

A question similar to this has often been discussed, where the assignee from the lessor of a written lease has sought to enforce the covenants against the lessee, and it appears to be fully settled that the lessee is estopped to deny the title of the assignee of the lessor to the same extent that he is that of the lessor. While he cannot deny that the lessor had title at the time he entered under him, he may show that the title has expired, that he has been evicted by title paramount, and make such other defences as he may against the landlord. The note of Sergeant Williams in 2 Saunders, 418, is, "Where the grantor or lessor has nothing in the lands at the time of the grant or lease, and therefore no interest passes out of him to the grantee or lessee by the grant or lease, but the title begins by the estoppel which the deed creates between the parties, such estoppel runs with the land, into whose hands soever it comes, whether heir or assignee." This note is adopted in *Cuthbertson v. Irving*, 4 H. & N. 742, as a correct statement of the law, and the cases on the subject are carefully collected by Baron Martin. In *Cuthbertson v. Irving*, 6 H. & N. 135, in the Exchequer Chamber, it was held that the plaintiff, who was the assignee of the reversion of a lease, might establish his title by estoppel, and that, as no other legal estate or interest was shown to be in the lessor, it must be taken as against the lessee by estoppel that the lessor had an estate in fee. Where A. hired apartments of B., who then let the entire house to C., who sued A. in an action for use and occupation, it was held that, as A. could not impeach the title of his original landlord, he could not that of his grantee. *Rennie v. Robinson*, 1 Bing. 147.

Where a tenant would be estopped from disputing the title of his landlord, says Mr. Chitty, he is also estopped from disputing that of his assignee. Chit. Con. (11th Am. ed.) 463. The rule

that a tenant shall not impeach the title of his landlord is one of convenience, whose tendency is to prevent fraud and to facilitate the letting of estates; and, when the tenant has entered under the plaintiff's grantor, and maintains the possession thus acquired, as well as when he has entered under the plaintiff, it would seem that he should by proper evidence bring himself within the exceptions to the rule. The considerations which dictate the rule in favor of the landlord's title apply with equal force to that of his assignee, and the tenant is not injured when his rights as against the landlord are primarily, at least, made the measure of his rights against the assignee.

While the precise question raised by the defendants in the case at bar has not in terms been passed upon in this court, it appears to have been fully recognized that it was for the tenant, by evidence as against the assignee of his original lessor, to bring himself within the exceptions to this rule. Thus, in *Cobb v. Arnold*, 8 Met. 398, the opinion of Mr. Justice Hubbard recognizes that one entering by permission of the grantor of the plaintiff is in the same position as if he had entered by permission of the plaintiff. In *Howard v. Merriam*, 5 Cush. 563, 567, it is said by Chief Justice Shaw, speaking of the summary landlord and tenant process, "This seems to extend to every species of lease, . . . and to every lessor, assignee of the lessor, or reversioner, whether by act of law, or assignment *in pais*." In *Dunshee v. Grundy*, 15 Gray, 314, the tenant had actually paid rent to the assignee of one Bundy, who was the original lessor, but the instruction given, which was held correct, was, "that a technical attornment by the tenant was not necessary; that the assignment by Bundy to the plaintiff, accompanied by notice of it to the defendants, created the relation of landlord and tenant between the plaintiff and the defendants."

When a tenant is compelled to admit a title in the landlord under whom he occupies as tenant at will, he must be held to admit this not merely as authorizing the landlord to collect rent or compensation for use and occupation, but also as *prima facie* authorizing the landlord to do those acts which the owner of property may lawfully do, among which is the right to terminate an estate at will by a conveyance of the property. If it is otherwise, the burden of showing this should be on the tenant.

The defendants rely much on the cases of *Hilbourn v. Fogg*, 99 Mass. 11, and *Palmer v. Bowker*, 106 Mass. 317, and urge that their position is a necessary corollary therefrom. In *Hilbourn v. Fogg*, the rule, as stated by Mr. Justice Gray, places the tenant in the same position in regard to the assignee as to the lessor, and holds that the tenant is estopped to deny the lessor's title at the time of making the lease, as against the lessor, his heirs and assigns. In these cases, the tenant had assumed the burden of proof, and had offered to rebut the estoppel arising from his having entered under the landlord whose assignee or grantee brought the suit. It was held in them, that it was not inconsistent with the relations of a tenant to deny the right of the landlord to convey to another a greater estate than that which the tenant himself derived from his lease, and that, further, he might show that an assignment made by the landlord was ineffectual to pass the landlord's title. But these decisions go only to this extent.

Many cases have arisen where the assignee was a subsequent mortgagee, the tenant being the lessee of the mortgagor. While in these it has been held that the tenant might show that no estate passed to the mortgagee, our attention has not been called to any in which it has been held that the burden of proof, where a conveyance was in proper form, to show affirmatively that an estate did pass, was on the assignee. It was only after some controversy, indeed, that the right of the tenant to show that the landlord had no right to convey any title, or one greater than that of the tenant, was established. *Hilbourn v. Fogg*, *ubi supra*, and cases cited. When a tenant has accepted an estate at will, and is estopped to deny that the landlord had originally a title to grant it, and when the ordinary effect of alienation by written lease of one having title is to determine the estate at will, the tenant should be held to prove either that the landlord could not convey at all, or could not convey a title greater than that of the tenant.

Exceptions overruled.

DENNIS O'CONNER vs. MARGARET HURLEY & others.

Norfolk. March 12, 1888. — May 8, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Action — Assumpsit — Implied Contract — Mortgage Note — Presumption of Payment — Amendment.

A person contracted with a widow to build a house on land mutually supposed to be hers, but in which she had a right of dower only, the fee being, without their knowledge, in her daughters. The daughters, who knew of the contract and did not object thereto, expressed themselves as pleased that their mother was to have a home, and made suggestions as to the building, but neither the daughters nor the contractor understood that they had made any agreement with each other. *Held*, that no contract could be implied on the part of the daughters to pay for the house.

On the completion of the house the widow gave her note and a mortgage on the land to the contractor for the cost, and paid him interest thereon. Pending a foreclosure, he discovered the error as to title, but proceeded therewith, and realized a certain sum therefrom. *Held*, that the note operated as payment, and that she was not liable on the original agreement.

CONTRACT, in two counts, to recover the price of a dwelling-house erected on land in which the first-named defendant had a right of dower, and the other defendants, her daughters, owned the fee. The first count alleged that the defendants, having requested the plaintiff to erect a dwelling-house for them on the land, and having promised to pay him therefor, owed the plaintiff for the cost thereof; and the second count alleged that they owed him the same amount as for money laid out and expended by him for their use. Answer: 1. A general denial. 2. Payment.

Trial in the Superior Court, without a jury, before *Barker, J.*, who found for the plaintiff, and reported the case for the determination of this court, in substance as follows:

In December, 1882, Mrs. Margaret Hurley, widow, and two of her daughters, were occupants of a hired house from which she was obliged to move. The plaintiff, her brother, suggested that she build a house for herself and family upon a piece of land of which he and all the defendants supposed that she was the owner, but the fee of which was in her daughters, subject to her dower. She replied that she had no money. The plaintiff then

said that he would furnish the money if he could have the land and house as security, to which Mrs. Hurley assented. All the defendants afterwards knew of this arrangement of the plaintiff to build a house upon the land, and made no objection thereto, although the plaintiff and the daughters did not intend to make, and did not understand that they had made, any bargain with each other, because all parties supposed that the mother owned the property, and what the plaintiff did up to the time of taking a mortgage was done with that understanding. The house was completed early in 1883, and Mrs. Hurley and her family at once moved into it, and have continued to occupy it ever since. Two of the daughters were living out in families where they were supplied with board, but at times, for longer or shorter periods, visited their mother at the house. During the time the house was being built all the daughters knew of the fact, and from time to time visited the land, and expressed themselves as pleased with what was being done, and it was built with their knowledge and consent. They testified that they were pleased because they were interested in their mother's having a home. Conversations also took place at different times between the plaintiff and the daughters, concerning some of the details of the building, and each of them made suggestions, some of which were adopted and some were not. The house was a proper one to build upon the lot of land referred to, and suitable for the occupancy of persons of the condition of the defendants, and the estate was benefited by the erection of the house to the full value of the money expended upon it.

About a year after the completion of the house, the plaintiff requested Mrs. Hurley to give him a mortgage and note for the amount expended in building the house, which she thereupon did, and received from the plaintiff in exchange receipted bills for the money expended by him in erecting the house. At this time all parties supposed that Mrs. Hurley had a right to make this mortgage, and the note and mortgage were accepted only because of the belief of the plaintiff that she had a right to execute the mortgage, and that it gave him a complete security upon the entire fee of the estate. Mrs. Hurley at different times paid to the plaintiff \$237.87, being the interest upon the mortgage up to October, 1885. The plaintiff foreclosed the mortgage

in April, 1886, and pending the foreclosure proceedings he and all the defendants for the first time learned that the fee of the estate belonged to the daughters. The mortgage note bore the following indorsement: "Received by foreclosure three hundred and sixteen dollars, being three hundred and ninety-eight dollars, less eighty-two dollars, expenses."

The judge found that the note of Mrs. Hurley was not, under the circumstances, a payment of the money due to the plaintiff, because the plaintiff supposed at the time he was getting a mortgage of the fee, and found for the plaintiff in the sum of \$1982.24, being the face of the mortgage and interest, less the amount already paid thereon. After the trial and findings, the note and mortgage were deposited with the clerk of the court by the plaintiff, with the statement that they were to be cancelled, if judgment was rendered for the plaintiff. Judgment was to be entered for the plaintiff for the amount found, if the evidence should warrant it; otherwise, for the defendants.

C. F. Perkins & A. M. Lyman, for the defendants.

C. H. Drew, for the plaintiff.

DEVENS, J. The ground upon which the plaintiff seeks to establish his position, that a contract should be implied on the part of the defendants other than Mrs. Margaret Hurley (being her daughters) to pay to him the cost of the dwelling-house which he erected upon their land, in which Mrs. Hurley had a dower interest only, is that they knew that the plaintiff had made an express contract with Margaret to build a house thereon, that they not only did not object thereto, but, being aware of the fact, expressed themselves pleased therewith, as they were desirous that their mother should have a home, and made some suggestions in regard to the building.

It appears that at this time all parties believed that the land was the sole property of Mrs. Hurley; that the agreement was between her alone and the plaintiff, that he would build the house, if he could have it and the land as security; and that she subsequently mortgaged the same to him as security for the note given by her to him for his outlay. It is found that the "plaintiff and the daughters did not intend to make, and did not understand they had made, any bargain with each other, because all parties supposed that the mother owned the property," and all

that the plaintiff did was done with that understanding up to the time of completing the contract and of taking the mortgage.

As the house was a suitable one, and added to the value of the property to the amount which had been expended in its erection, the plaintiff now contends that the daughters are liable, as valuable services have been rendered on their land of which they may avail themselves in their use of it, and that they should be held responsible for the payment therefor.

If the daughters had known that this land was their property, that an expensive structure was being erected thereon, and that the builder expected that they would pay therefor, there would undoubtedly be evidence from which a contract so to do might be implied. *Day v. Caton*, 119 Mass. 513. When they had no knowledge that the land was theirs, and when they knew that another whom they supposed to be the owner had expressly agreed to pay therefor, no such inference can be made. They assented merely that the owner of the land should do what she desired with her own property, and were pleased and interested because the supposed owner was their mother. *Hills v. Snell*, 104 Mass. 173, 177. *Hayes v. Fessenden*, 106 Mass. 228, 230.

One cannot, merely by erecting a house on the land of another, compel him to pay for it, even if the land is benefited by the erection of the structure. *Wells v. Banister*, 4 Mass. 514. Such a promise cannot be implied, even if the owner uses the structure thus erected, as while it remains upon his land he is entitled to the proper use of his own land and of all that is upon it. If one voluntarily accepts services rendered for his benefit when he has the option whether to accept or reject them, a promise to pay for them may sometimes be inferred. But when one has so far taken possession of the land of another as to erect a structure upon it, the owner has no such option, if he would avail himself of his full rights to the use of his land.

In the case at bar, it does not appear, however, that the daughters have occupied this building in any way, except by visiting their mother, who occupies the house, or that they have ever objected to the removal of the house by the plaintiff. It was built upon their land by mistake, and they have not sought as yet to assert any title to it. The plaintiff urges, that the court has found that there was a contract between the plaintiff and the

daughters, and that this is a question of fact necessarily involved in the general finding for the plaintiff. But as the case is reported, the presiding judge has found for the plaintiff only in case the evidence warrants it, and in our view the evidence does not so warrant.

If the action cannot be maintained against the daughters, the question remains whether it may now be sustained upon the original contract made between the plaintiff and Mrs. Hurley, or whether, even if the plaintiff is entitled to an action against her, it must be upon the note. A plaintiff may, of course, bring an action upon the original cause, as for the purchase of goods, and also, as an alternative, unite with it a count upon a note given for the goods. These are only different modes of stating what is, in substance, the same cause of action, intended to meet the evidence at the trial.

The plaintiff has relied solely, in the case at bar, on the original contract. His declaration contains no count upon the note given by Mrs. Hurley and secured by the mortgage on the land, in which she had a valuable estate, although she did not, as all parties supposed, own the fee thereof. It was found by the presiding judge, that the note of the defendant Margaret Hurley "was not, under the circumstances, a payment of the money due to the plaintiff, because the plaintiff supposed at the time that he was getting a mortgage of the fee." It is not quite clear whether this is intended as a ruling as matter of law, or as a finding upon a question of fact. In the view we take of the case this will not be important.

It has long been the law of Massachusetts, that when a party, bound to the payment of a simple contract debt, gives his promissory negotiable note therefor, it is *prima facie* evidence of payment, and will be presumed to have been accepted in satisfaction of the pre-existing debt. The party receiving it has the same responsibility for payment that he had before, more direct and unequivocal evidence of the debt, a more simple remedy for recovering it, and the power to transfer his interest to another. But this presumption is not conclusive, and may be rebutted by evidence that such was not the intention of the parties, which intention may properly be inferred from proof that, if thus treated, the party will have relinquished valuable security. *Mel-*

ledge v. Boston Iron Co. 5 Cush. 158, 170. *Ely v. James*, 123 Mass. 36. *Green v. Russell*, 132 Mass. 536. *Tucker v. Drake*, 11 Allen, 145. So where a new note is given for an old one secured by mortgage, it will not be held that the original debt with the mortgage for payment thereof was thus discharged, unless it appears affirmatively that such was the intention. *Pomroy v. Rice*, 16 Pick. 22. *Bryant v. Pollard*, 10 Allen, 81.

In the case at bar, while the plaintiff supposed he was getting a security which he did not receive, no fraud was practised upon him, and the mistake of himself and Mrs. Hurley was mutual. He relinquished no right by accepting the mortgage, and in the mortgage note had provided himself with a more effectual means of enforcing his debt, and had also obtained a valuable, although insufficient, security by a mortgage, which passed Mrs. Hurley's estate in the land. Nor are these all the circumstances to be considered in deciding whether the plaintiff may now enforce his original contract against Mrs. Hurley. He received from her interest upon the note while both he and she supposed she was the owner in fee of the land, and thereafter proceeded to foreclose his mortgage.

Pending the foreclosure proceedings, his error as to the title was discovered. If it was his wish to relinquish the note and mortgage, as received by error as to the title, and to hold Mrs. Hurley to her original contract, it was his duty then to have made his election so to do. The note and mortgage were certainly given and received as payment, even if by reason of the mistake he was not obliged to treat them as such. He did not do this, but proceeded with the foreclosure of his mortgage. The indorsement on the mortgage note shows that he received thereon three hundred and ninety-eight dollars, less eighty-two dollars, the expenses of the foreclosure proceedings. The plaintiff now brings into court and deposits with the clerk the note and mortgage to be cancelled, if judgment is rendered for him. He does not, and presumably cannot, tender back to Mrs. Hurley her dower estate, of which he has deprived her by enforcing his mortgage.

It could not be held, as matter of law, therefore, on all these facts, that, because the plaintiff originally received the note and mortgage in ignorance of the defect in the title, he can now

enforce his original contract, nor would any finding of fact be warranted that he had not ultimately, with full knowledge, retained the note and mortgage in payment of his original contract.

Should the plaintiff desire to proceed against Mrs. Hurley upon the note, on proper application to the Superior Court to amend his declaration, his motion, and the terms, if any, on which it should be granted, will undoubtedly be there entertained and considered.

Judgment for the defendants.

CHARLES H. FISKE vs. BENJAMIN EDDY & others.

Suffolk. March 30, 1888. — May 8, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Devise — Trust — Income — Residue — Heir at Law.

A testator gave four estates to trustees, who were to pay the net income of two estates to two sons, whose financial ability he seemed to doubt, "during their joint lives, one half to each, and to the survivor during his life," the income of the other two estates to his wife during her life, and, at her death, the income of the four estates to the two sons, "one half to each during their joint lives, and upon the decease of either" during the life of a third son, "then to pay one fourth part of said net income of said four estates . . . during the life of the survivor" to the third son, "and the other three fourths to the said survivor so long as both he" and the third son should live. The fee of the estates was given to the issue of the two sons, or of the survivor if either should die without issue, and, if neither should leave issue, to the testator's "then heirs at law"; any unexpended income of the trust fund, at the death of either of the two sons, was to be disposed of as he should appoint, otherwise it was to be applied to the benefit of the survivor, his family or children; and the residue of the estate was given to the third son. *Held*, that the survivor of the two sons, the wife and the third son having died, was entitled to the whole of the income of the trust fund during his life.

BILL IN EQUITY, filed September 22, 1887, by the trustee under the will of Caleb Eddy, for instructions as to the disposition of the income of a trust fund. The bill alleged that Caleb Eddy made a will, dated October 9, 1858, which, after gifts to his wife, Caroline Eddy, and to his son, Robert H. Eddy, contained the following provisions, which are alone material.

"I give, bequeath, and devise my two dwelling-house estates in said Boston numbered respectively twenty-four and twenty-six on Harrison Avenue, the same purchased of Walter Bryant, also my two dwelling-house estates numbered respectively seventeen and nineteen on Green Street in said Boston, with the appurtenances thereto belonging, to Francis A. Brooks of said Boston and Robert E. Bemis of said Chicopee and to the survivor of them, their heirs, successors, and assigns, or to such one of them as shall accept this trust, his heirs and assigns, but in special confidence to hold, manage, and dispose of the same upon the trusts and for the purposes following, that is to say, to lease, demise, and let the same, keeping them in proper repair, insured against fire, and in good tenantable order, improving or rebuilding if necessary so as to realize the largest income therefrom, to collect and receive the rents or income thereof, and after paying and defraying all taxes, assessments, insurance, repairs, and other charges and expenses whatsoever, including a proper compensation for their own services, to apply and pay the residue, or net rents, income, and profits thereof, as follows, viz.: the net income of estates numbered twenty-four and twenty-six on Harrison Avenue, semi-annually or oftener, to my sons Benjamin and Albert M. during their joint lives, one half to each and to the survivor during his life.

"The net income of estates numbered seventeen and nineteen on Green Street, semiannually or oftener, to my said wife, Caroline, for her use and benefit during her life, the same together with the preceding bequest herein to my said wife to be in lieu of her dower in my estate: and in further trust, upon and after the decease of my said wife, whether she shall survive me or not, semiannually or oftener, to pay the net income as aforesaid of said estates both on Green Street and on Harrison Avenue to my sons Benjamin and Albert M., (unless the said trustees or trustee, their or his successors or successor in said trust, shall, in pursuance of the provisions hereinafter contained, deem it expedient or proper to reserve and withhold said payments or some part thereof,) said net income, unless so withheld, to be paid one half to each during their joint lives; and upon the decease of either the said Benjamin or the said Albert M.

leaving no lawful issue during the life of the said Robert H., then to pay one fourth part of said net income of said four estates on Green Street and Harrison Avenue, during the life of the survivor, to my said son Robert H., and the other three fourths to the said survivor so long as both he and said Robert H. shall live.

“ Provided, however, that in case of and upon the death of the said Benjamin and Albert M., or either of them, leaving lawful issue, my will is that the said four estates on Green Street and Harrison Avenue go to such lawful issue in fee as follows, viz. : one half thereof to the issue of the said Benjamin and one half thereof to the issue of the said Albert M., said halves or half to become vested in such issue immediately upon the decease of the fathers respectively ; and that, in case either the said sons Benjamin or Albert M. first dying shall leave no such issue at his decease, the whole of said four estates shall, upon the decease of the survivor leaving lawful issue, go to such issue in equal shares ; and I direct that the said trustees or trustee for the time being make such partition and division of said estates, and execute such deeds of conveyance thereof, as may be equitable and proper to carry out this devise, and to vest in such issue a title in fee in said estates, or in the portion thereof herein given to them as above, whenever such issue shall become entitled thereto.

“ And upon the decease of my said wife and both my said sons Benjamin and Albert M., neither leaving lawful issue, my will is that the said four estates on Green Street and Harrison Avenue go to my then heirs at law.

“ In case my said wife shall elect to waive the provisions in her favor in this will contained, and shall claim and hold her dower in my real estate, I direct that the said trustees or their successors or successor in said trust shall during the life of my said wife pay the net income of said estates on Green Street subject to such dower to my son Robert H., for his own use, instead of to my said wife as hereinabove provided.

“ And I further direct, that if, in the opinion of the said trustees, their successors or successor, or him or them acting as such, it shall not be expedient or for the interest of my said sons Benjamin and Albert M., or either of them, that said income hereinabove given to them should be paid over to them or either

of them in whole or in part as above, or if the benefit thereof if so paid over would not be realized by them as herein intended by me, then said trustees, or the one of them or he or they acting as such, may in their or his discretion retain, reserve, and withhold said income or part thereof from them or either of them, and hold, appropriate, or apply the amount so withheld in such manner as in their or his judgment shall be most for the advantage of him or them respectively whose share is so withheld, or in providing for the support and maintenance of them or either of them, their or his family or children.

“And my will is that the income above given to said Benjamin and Albert M. shall not be liable to be aliened, sold, attached, mortgaged, or incumbered, but shall be devoted by said trustees to the personal use and benefit of said Benjamin and Albert M., or one of them, their or his respective families or children; and if any such income shall remain in the hands of the said trustees or their successors unexpended at the decease of said Benjamin or Albert M., leaving no issue, the same shall be disposed of in such manner as the said Benjamin or Albert M. shall in writing appoint; and in default of such appointment it shall be applied for the benefit of the survivor, his family or children.

“The said trustees above named, their successors or successor, or he or they acting as such, are hereby authorized and empowered, if they think it advisable at any time, to sell and dispose of and convey the real estate and other property devised to or held by them in trust, . . . the net proceeds or avails thereof to be held, applied, and appropriated upon the trusts and in the manner herein provided concerning the original property herein devised. . . .

“My paintings, family portraits, and other pictures, as also the residue of my estate both real and personal, I give, bequeath, and devise to my son Robert H. Eddy, his heirs and assigns, for his own use.”

The bill also alleged that Caleb Eddy died on February 22, 1859, leaving his wife and three sons then living, but no other issue or heirs at law; that this will was duly admitted to probate in March, 1859; that the trustees named in the will were duly appointed and continued to act as such until the resigna-

tion of the survivor of them on December 8, 1880, when the plaintiff was duly appointed trustee under the will; that Albert M. Eddy died on December 1, 1860, leaving no issue; that the testator's wife, Caroline Eddy, died on May 28, 1862, never having waived the provisions of the will; that Robert H. Eddy, who died on May 18, 1887, by his will, after bequests to his wife, Annie G. Eddy, and to his brother, Benjamin Eddy, gave the residue of his estate to trustees, of whom Charles U. Cotting was the survivor, to pay the income to her for life, and at her death to pay the principal to certain persons, and named Cotting and the plaintiff as executors thereof; and that Benjamin Eddy was the sole survivor of those named in the will of Caleb Eddy, and had three children living, all of full age.

The bill further alleged, that the plaintiff, as trustee under the will of Caleb Eddy, held, as the principal of the trust fund thereby created, the two estates on Harrison Avenue, and the proceeds of the two estates on Green Street, which were duly sold by one of the former trustees; that the plaintiff had collected and still had in his hands the income of such trust fund which had accrued since the death of Robert H. Eddy; and that Benjamin Eddy contended that the whole of the income of the trust fund should be paid to him during his life.

The answers admitted the allegations of the bill. The bill was taken as confessed against the remainder-men under the will of Robert H. Eddy.

Hearing before *Devens, J.*, who reserved the case for the consideration of the full court.

E. H. Bennett, for Benjamin Eddy.

A. Fiske, for Annie G. Eddy.

F. C. Welch, for Cotting.

DEVENS, J. The will of Caleb Eddy gives "the net income of estates numbered twenty-four and twenty-six on Harrison Avenue, semiannually or oftener, to my sons Benjamin and Albert M., during their joint lives, one half to each and to the survivor during his life." The testator then gives the income of the estates numbered seventeen and eighteen Green Street to his wife, who is now deceased, "and in further trust upon and after the decease of my said wife, whether she shall survive me or not, semiannually or oftener, to pay the net

income as aforesaid of said estates, both on Green Street and on Harrison Avenue, to my sons Benjamin and Albert M., . . . said net income . . . to be paid one half to each during their joint lives, and upon the decease of either the said Benjamin or the said Albert M., leaving no lawful issue, during the life of the said Robert H." (who was another son of the testator), "then to pay one fourth part of said net income of said four estates on Green Street and Harrison Avenue during the life of the survivor to my said son Robert H., and the other three fourths to the said survivor so long as both he and said Robert H. shall live."

Robert H. is, under the will, the residuary devisee and legatee of all the testator's property which is not specifically disposed of. Benjamin is still living, and the instruction requested relates to the disposition during his life of the income from these estates, Robert H. having now deceased. That at the decease of Benjamin his children will have the fee in them is not controverted. A subsequent clause of the will gives this to the issue of the survivor of Benjamin and Albert M., if one should die without issue, and if neither should leave issue, then to go to the testator's "then heirs at law." Albert M. died without issue, but Benjamin has three children living, who are now all of full age.

On behalf of Annie G. Eddy, the widow of Robert H., representing the estate of her late husband, it is contended that she is now entitled to the whole income from these four estates, or in any event to one fourth thereof, until the death of Benjamin, by virtue of the residuary clause in the testator's will. After the death of Albert M., and during the life of Robert H., this income had been divided between Robert H. and Benjamin in the proportion of one fourth and three fourths. The inquiry is now, What is to be done with the income of the trust estates after Robert's death, and during Benjamin's life? The income of the Harrison Avenue estates was, in express terms, given to the survivor of Albert M. and Benjamin for life. To maintain the larger contention of Mrs. Eddy, it would be necessary to hold that this was taken away by the subsequent clause. This would be to extend the meaning of the latter more than can fairly be done.

Disregarding, for the moment, the provision as to the receipt of one fourth of the income by Robert H. in the event of the decease of one of his brothers before the other without issue, if the provision as to the Harrison Avenue estates had terminated with the words which provide for the payment of the income of both the Green Street and Harrison Avenue estates to Albert M. and Benjamin, during their joint lives, it would be reasonably clear that the survivor was to take the income of all these estates. In dealing with the Green Street estates, it was necessary to mention them separately, because the testator desired to appropriate the income from them to his widow during her life. Having done this, he proceeds to give the income subsequent to her decease to these two sons during their joint lives. He does not here add "and to the survivor during his life," but the connection into which he has brought those estates with the Harrison Avenue estates, and the subsequent disposition of the four estates in fee to the issue of these two sons, or of that one who shall have issue, and the provision which is found in the will subsequently, that any income not expended at the decease of either shall be disposed of as he shall appoint, and "in default of such appointment it shall be applied for the benefit of the survivor, his family or children," show that these four estates were set apart from the rest of his property for the benefit of these sons, and that neither these estates nor any income from them were to pass into the residuum of the estate.

The clause which follows this bequest of the income to these two sons modifies it to this extent, that, under certain circumstances, it gives a portion of the income to Robert H. ; but it does no more than this, nor does it leave any portion of the income undisposed of. So long as both Robert H. and the survivor of the other two brothers live, the survivor is to receive the income of the trust estates, diminished by one fourth, which is to be paid to Robert H. When Robert H. dies, it remains for his life to the surviving brother. This interpretation seems in strict conformity to the whole intention of the testator, as gathered from all parts of his will. If he had intended to give to Robert H. anything more from the estates thus set apart to the other two sons, there would have been found some expression of this.

The defendants urge that the language used in the gift of a

portion of the income to Robert H. indicates that at his decease the whole is to pass into the residuum of the estate. By this construction, the surviving brother of the two for whom the testator has made most careful provision — other parts of the will to which we have not especially adverted showing that he had little confidence in their ability to manage property — would be left for the remainder of his life without any means of support derived from the income of the estates apparently set apart for them. The language by which this income is dealt with, in the event of one of the brothers surviving, while Robert H. survives, is not fortunately chosen; but we find no intent there exhibited that at the decease of Robert H. it is to be treated, either in whole or in part, as property undisposed of, except by the residuary clause of the will.

When the testator says, that on the death of either Benjamin or Albert M., leaving no lawful issue, during the life of said Robert H., one fourth of said net income of said four estates was to be paid during the life of the survivor "to my said son Robert H., and the other three fourths to the said survivor, so long as both he and said Robert H. shall live," his intention is to provide that the survivor, instead of having the whole income which he has bequeathed to his sons for their joint lives, shall, while Robert H. lives, have but three fourths thereof, while Robert H. has the remaining fourth. If the word "only" were inserted before the words "the other three fourths," the idea which the testator had in his mind, to reduce the income of the survivor while Robert H. lived, would be expressed more clearly, as it would then read that the survivor was to have only the three fourths "so long as both he and said Robert H. shall live," thus leaving the income undiminished when Robert H. should decease.

It has not been found necessary, in this view of the case, to consider what the rights of Benjamin might be as heir at law, if the income of this fund were not disposed of by the will.

The trustee should be instructed that the net income derived from the trust fund created by the will of Caleb Eddy should be paid to Benjamin Eddy during his life, together with that which has accrued since the death of Robert H.

Instructions accordingly.

ROBERT B. BRIGHAM vs. FRANCES G. BRIGHAM.

Suffolk. March 14, 1888. — May 10, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Divorce — Alimony — Presumption of filing Exceptions — Decree — Execution.

Alimony may be allowed to a wife after a decree *nisi* for a divorce has been rendered against her.

Exceptions will lie, under the Pub. Sts. c. 146, § 84, and c. 153, § 8, from a decree for the payment of such alimony.

If such exceptions are filed within eight days from the date of such decree, and are allowed by the presiding justice, it will be presumed that the time of filing was duly extended, under the Pub. Sts. c. 153, § 8.

If no decree is made allowing such alimony, an execution cannot be issued for its payment.

PETITION, filed on July 14, 1886, by the libellee in a divorce case, alleging that, while the libel, which was filed September 2, 1884, and a cross libel, filed by her in April, 1885, were pending, an agreement was filed in both cases, on July 10, 1885, by counsel, which provided for "alimony during the pendency of the libels, at the rate of forty dollars per week, from and after April 16, 1885, to be paid once in four weeks" by the libellant to the libellee; that the sum stipulated in the agreement was paid to her as provided until May 22, 1886, when her libel was dismissed, and a divorce *nisi* was granted to the libellant; that nothing had been paid to her since that date, though duly demanded by her; that the libellant had informed her that he would not pay any further sums in accordance with the agreement; and praying that an execution might issue against the libellant for the sums then due under the agreement, and for interest thereon. The only entry in the docket record in either case as to alimony, prior to the filing of the petition, was as follows: "April term, 1885, July 10, agreement as to alimony *pendente lite* filed."

Hearing before W. Allen, J., who, on August 6, 1886, ordered a decree that execution be issued for the payment of the alimony as prayed for. On August 13, 1886, the libellant filed a bill of exceptions, (which the judge "allowed if exceptions lie in the case,") and also appealed to the full court.

B. F. Butler, (F. L. Washburn with him,) for the respondent.

E. W. Burdett, for the petitioner.

MORTON, C. J. The justice who heard this case entered a decree that execution be issued for the payment of the alimony, in accordance with the prayer of the petition. The libellant both excepted and appealed. We see no reason to doubt that exceptions lie in such a case. Pub. Sts. c. 146, § 84; c. 158, § 8. *Sparhawk v. Sparhawk*, 120 Mass. 390. As these exceptions were filed within eight days after the ruling excepted to, and as the presiding justice allowed them, it is to be presumed that the time of filing was extended under the Pub. Sts. c. 153, § 8.

The question of the validity of the decree is properly before us. It is clear that the decree in this case was entered under a misapprehension on the part of the presiding justice. It was based upon the supposition that the record showed that there had been a decree allowing the libellee alimony. There being cross libels, an agreement had been made that the husband should pay the wife "alimony during the pendency of the libels, at the rate of forty dollars per week." But upon examination of the record it is found that no decree of the court was passed allowing alimony. The court has not the power to order an execution to issue unless there is a judgment or decree of the court upon which it is founded. It follows that the decree ordering an execution to issue was erroneous.

There is no doubt of the power of the court to allow alimony in favor of the wife, after a decree *nisi* has been rendered against her. Pub. Sts. c. 146, §§ 15, 36. *Graves v. Graves*, 108 Mass. 314.

The case may stand for a further hearing before a single justice, upon such amendment of her petition as the petitioner may be advised to make.

Decree reversed.

COMMONWEALTH vs. JAMES F. PIERCE.

Norfolk. April 2, 1888. — May 10, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Intoxicating Liquors — Common Nuisance — Retail Druggist — Purchaser — Certificate.

A retail druggist, not licensed to sell intoxicating liquors, who sells in his shop pure alcohol for medicinal, mechanical, or chemical purposes, without the certificate of the purchaser stating for what it is to be used, as required by the St. of 1887, c. 431, § 2, is liable for maintaining a common nuisance under the Pub. Sts. c. 101, § 6.

COMPLAINT alleging that the defendant kept and maintained a common nuisance, to wit, a tenement in Quincy, used for the illegal sale and illegal keeping of intoxicating liquors on May 1, 1887, and on divers other days and times between that day and August 20, 1887. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, in substance as follows.

The defendant was, during the time alleged, a retail druggist, and kept a drug store in Quincy, and had no license as such druggist or otherwise to sell intoxicating liquors. Evidence was admitted, against the defendant's objection, which tended to show that, between June 16, 1887, and August 20, 1887, sales of pure alcohol for medicinal, mechanical, and chemical purposes were made on the premises, without certificates being made by the purchasers stating the use for which the alcohol was wanted. The government offered no evidence of sales on the premises of other intoxicating liquors than alcohol during this time.

The defendant requested the judge to rule: 1. Upon the evidence, the defendant cannot be convicted of keeping a common nuisance, as charged in the complaint. 2. The defendant was not required to have a certificate of the purchaser in order to sell alcohol for medicinal, mechanical, or chemical purposes, nor to keep a book, nor to conform to the requirements of the St. of 1887, c. 431, §§ 2-4. The judge declined so to rule, but instructed the jury, that, if they were satisfied that the defendant, for any substantial period of time between June 16, 1887, and August 20, 1887, maintained the premises for the unlawful sale of in-

toxicating liquors, he was guilty; and that sales of pure alcohol for medicinal, mechanical, or chemical purposes, without the certificate described in the St. of 1887, c. 431, § 2, would be illegal, and evidence upon which the jury would be justified in convicting the defendant of the offence charged.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

E. C. Bumpus, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

W. ALLEN, J. The only question presented is whether a retail druggist, not licensed to sell intoxicating liquors, who sells in his shop pure alcohol for medicinal, mechanical, or chemical purposes, without a certificate of the purchaser stating the use for which the same is wanted, is liable for maintaining a common nuisance under the Pub. Sts. c. 101, § 6. The answer depends upon the construction of the St. of 1887, c. 431, entitled, "An Act to limit and regulate the sale of intoxicating liquors by retail druggists and apothecaries," and approved June 16, 1887.

Before the act of 1887, retail druggists were authorized to sell pure alcohol for medicinal, mechanical, and chemical purposes, and they could also be licensed, under the fourth class of licenses, "to sell liquors of any kind, not to be drunk on the premises," and under the sixth class, including "licenses to druggists and apothecaries to sell liquors of any kind for medicinal, mechanical, and chemical purposes only, and to such persons only as may certify in writing for what use they want it." St. 1875, c. 99, §§ 2, 7, and St. 1878, c. 203, compiled in the Pub. Sts. c. 100, §§ 2, 10. It was in the discretion of the municipal authorities to grant licenses of the sixth class without a vote of their city or town, and persons licensed under that class were required to keep a record of sales made by them. Pub. Sts. c. 100, §§ 3, 5.

The St. of 1887, c. 431, besides requiring municipal authorities to issue licenses of the sixth class, and making particular provisions concerning the records of sales made, contained the following provisions, material to the question under consideration: "§ 1. No license, except of the sixth class, . . . shall be hereafter granted to retail druggists or apothecaries for the sale of spirituous or intoxicating liquor. . . . § 2. Sales of intoxicating liquor of any kind by retail druggists and apothecaries, for medi-

cinal, mechanical, or chemical purposes, shall be made only upon the certificate of the purchaser, which certificate shall state the use for which the same is wanted, and shall be immediately cancelled at the time of such sale in such manner as to show the date of cancellation."

The authority to sell pure alcohol without a license, and to sell any kind of intoxicating liquors under a license of the sixth class, was not affected by the statute unless by the second section. Without that section retail druggists could, without a license, sell to any person pure alcohol for the purposes mentioned, and could be licensed to sell any kind of intoxicating liquors for the purposes mentioned but to such persons only as certified in writing for what use they wanted it. We cannot construe the second section as limited to the latter class, and as intended to change the old law only by providing that the certificate required by it should be cancelled. The language includes both classes, and we think that the intention of the Legislature was to put authorized sales of alcohol without a license on the same footing in respect to a certificate of the purchaser as sales of liquors authorized by a license, and to prohibit all sales of intoxicating liquors by retail druggists and apothecaries except upon a certificate of the purchaser.

It is argued that §§ 3 and 4 will not be held to include sales of alcohol without a license, because there would be no need of inserting in the record of such sales the kind of liquor sold. These sections re-enact, with changes, the law relating to licenses of the sixth class, (Pub. Sts. c. 100, § 3,) and revive with changes the law applicable to sales of alcohol without a license, as it existed until it was repealed by the law authorizing licenses of the fourth class to druggists, which was itself repealed by the St. of 1887, c. 431. Gen. Sts. c. 86, § 26. St. 1869, c. 415, § 28. St. 1875, c. 99. If the record was intended to include sales of both classes, it would naturally include all the particulars required of sales under either class.

It is further argued, that the provisions in § 5, that any one convicted shall be liable to certain penalties, "and his license shall thereby be rendered void," shows that only licensed persons were intended. If the requirements of the statute apply alike to licensed and unlicensed persons, the fact of a license is immaterial to a conviction, and the forfeiture of the license as a consequence

of a conviction, not as a part of the sentence, would properly be expressed as following all convictions, without distinguishing whether of licensed or unlicensed persons, as a statute providing for the forfeiture of all personal property of persons convicted of felony would not be likely to be limited in terms to convicts who possessed property which could be forfeited. The Pub. Sts. c. 100, § 1, make illegal all sales of intoxicating liquor not authorized by the statute; § 2 authorizes sales of alcohol by druggists for certain purposes; the St. of 1887, c. 431, provides in § 2 that the sale so authorized "shall be made only upon the certificate of the purchaser."

We must construe this as restricting the authority before given, and so rendering sales by retail druggists of pure alcohol for medicinal, mechanical, or chemical purposes, without the certificate of the purchaser, illegal sales, within the meaning of the Pub. Sts. c. 101, § 6.

Exceptions overruled.

SARAH CECCONI vs. DANIEL RODDEN & another.

Suffolk. March 22, 1888. — May 17, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Deed — Boundary — Covenant — Warranty — Eviction — Improvements —
Damages — Party Wall — Building Act — Exceptions.*

A warranty deed described the lot conveyed as bounded by adjoining land and a building thereon "on the line through the centre of the partition wall," such wall being entirely on the land adjoining, and the grantee was evicted by the adjoining owner from the strip of land covered by the wall. *Held*, that the deed purported to convey to the centre of the wall and that the grantor was liable to the grantee in an action for breach of covenant of warranty.

A bill of exceptions alleged by the grantor stated that a witness for the plaintiff was permitted to answer a certain question, but did not disclose what the reply was, or that the answer was in any way unfavorable to the defendant. *Held*, that the defendant had no ground of exception.

The grantee had begun, before the eviction, to make improvements upon the strip of land covered by the wall and, after notice and pending a bill in equity by the adjoining owner to restrain him, in good faith proceeded to complete them. *Held*, that the grantee could recover the value of such improvements.

The deed contained no covenant that the wall was a party wall, and the presiding

judge at the trial so instructed the jury, as requested by the defendant, adding, that the plaintiff, in accordance with a decision of this court, the report of which was in evidence, had certain prescriptive rights in the wall. *Held*, that the defendant had no ground of exception.

The presiding judge further instructed the jury, that although the plaintiff could not, under a building act, erect a wall of more than a certain height, using the strip alone for that purpose, it did not follow for that reason that the land was not of substantial value. *Held*, that the defendant had no ground of exception.

CONTRACT to recover for breach of the covenant of warranty in a deed of land given by the defendants. Writ dated March 15, 1886. Trial in the Superior Court, before *Blodgett, J.*, who allowed a bill of exceptions in substance as follows.

On June 13, 1881, the defendants, Daniel Rodden and Margaret Rodden, by a deed, which contained the usual covenant of warranty, conveyed to the plaintiff a parcel of land in Boston, with the buildings thereon, bounding and describing it, so far as material, as follows: "Northeasterly by Endicott Street, nineteen feet and eight inches, including the passageway, three feet wide, running southwesterly from said street, northwesterly by land and building now or late of Paine S. Higgins, on a line through the centre of the partition wall, forty-two feet nine inches." The original deed of the premises, dated May 23, 1843, from Josiah Brown to one Harris, the defendants' predecessor in title, contained the same description.

The wall first mentioned in the deeds as a partition wall was built by Paine S. Higgins, the adjoining owner, entirely on his own land, and the wall and the land under it were owned at the time of the conveyance from the defendants to the plaintiff, and ever since had been owned, by Hugh McLaughlin, who was the grantee of Higgins. This wall was eight inches in thickness, about twenty-eight feet in length and thirty feet in height, and was entirely covered on the end on Endicott Street by the front wall of the house of McLaughlin, and the only connection of the wall with the building on the lot described in the deed from the defendants to the plaintiff was that the said building as it stood at the time of the conveyance was supported on that side by the wall, and it had been so supported for more than thirty years. Adjoining the wall on its southeast face and running the whole depth of the lot was the passageway described in the deed, which was covered, and five and a half feet in height, the fee

of which was conveyed to the plaintiff. The southeast face line of the wall was coincident in its whole length with the northwest line of this covered passageway. The defendants had, at the time of this conveyance to the plaintiff, acquired by adverse use the right to use the wall for the purpose of supporting the building standing on the lot conveyed as it then stood, and without any right to place any additional burden thereon, and without a right to tie into or disturb McLaughlin's front wall, which covered the end of it.

The defendants contended, and asked the judge to rule, that by a proper construction of the deed from the defendants to the plaintiff the boundary line was upon the northwest side of the southeast line of McLaughlin's land and buildings. The judge refused so to rule, but ruled that, by the deed from the defendants to the plaintiff, the boundary line upon the northwest side was the middle line of the partition wall.

One Stephen Brennan was called as a witness by the plaintiff, and was asked the following question: "Have you made estimates of the expense of erecting the present building upon the lot as it is described in the deed to the plaintiff, and also an estimate of the expense of erecting it on the land which the plaintiff actually owns, i. e. throwing out the one half of the partition wall and land under it, so as to get at the difference between these two expenses?" The defendants objected to this question; the bill of exceptions recited that "the question was admitted, and the witness allowed to answer," but did not disclose what the answer was.

It was conceded by the defendants that just prior to the date of the writ in this action the plaintiff had been evicted by McLaughlin from a strip of land four inches wide lying underneath the partition wall and between the northwest line of the covered passageway and a line running through the centre of the partition wall, which strip was the only land for which the plaintiff sought to recover damages. It appeared in evidence, that the plaintiff in August, 1885, before the eviction, had erected, resting it on the partition wall to the extent of the four inches which she then claimed to own, an additional story to her building, which McLaughlin afterwards compelled her to remove; and that she did this after she had received notice, and during the

pendency of a bill in equity filed against her by McLaughlin to restrain her from building upon the wall. The defendants asked the judge to rule that the plaintiff could not recover any sum for the value of the new structure; but the judge refused so to rule, and instructed the jury as follows: "If the plaintiff acted in good faith in the erection of that additional story, believing that she was the owner of this strip of land, as well as the other land about which there is no dispute, in assessing damages the jury should give the plaintiff the value of that portion of the structure which stood upon this strip of land, and that value would not be simply the value of the material, having in view how that part of that structure was related to the rest of the building upon the land."

The defendants asked the judge to instruct the jury that there was no covenant in the deed that the wall in question was a party or partition wall. The judge thereupon gave the instruction, adding, that it was adjudicated in *McLaughlin v. Cecconi*, 141 Mass. 252, the report of which case was in evidence, "that so far as the old building was concerned the plaintiff had a right to use that wall as a party wall, and that right had been acquired by use for thirty years."

The building on the land conveyed by the defendants to the plaintiff was a structure of brick, the front and rear walls of which were thirty feet in height, and the ridgepole of the building was some sixteen feet higher than the front and rear walls. The defendants asked the judge to instruct the jury that, "under the laws regulating buildings in the city of Boston in force at the time the plaintiff began the erection of her building, which was subsequent to the enactment of the St. of 1885, c. 374, the plaintiff could not use the said wall for building purposes, and that the plaintiff could not recover of the defendants any damages for loss of building rights on said wall." The judge declined to give this instruction, and instructed the jury as follows: "The plaintiff says that she has been greatly injured because of the failure of title to a narrow strip of land, and the right to use that strip as she pleases. The defendants say, that, if she owned this strip of land, she could not put up a building to the height of the present building, using simply the four inches of land and erecting a building upon that wall only four inches thick, because

that is prohibited by the statute relating to building in the city of Boston. That is a matter for your consideration, but it would not follow that the land was not of substantial value for that reason."

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

O. A. Galvin, for the defendants.

A. A. Ranney & I. R. Clark, for the plaintiff.

DEVENS, J. 1. It was held in *McLaughlin v. Cecconi*, 141 Mass. 252, that McLaughlin, who held the estate formerly of Paine S. Higgins, was the sole owner of the wall between his estate and that of the plaintiff in this action, and that the wall was wholly on his land, although Sarah Cecconi, through her grantors, had acquired certain prescriptive rights to use the same.

The plaintiff now brings this action for a breach of the warranty in the deed made to her by the defendants. It is not disputed that the entire wall is upon the land of McLaughlin, and that the plaintiff's only rights to use the same are those limited rights acquired by prescription. The contention of the defendants is, that, as the land conveyed by them to the plaintiff was bounded upon the land of McLaughlin, and as this is now shown to include the wall, the monument thus referred to governs the description given in the conveyance, and limits it.

But the question is not what the defendants actually conveyed, but what they undertook and by their deed purported to convey, and such a construction wholly disregards important words used by them in the description contained in their conveyance, to which their warranty applies. The language in their deed, referring to the disputed boundary, is: "Northwesterly by land and building now or late of Paine S. Higgins," (which estate is now that of McLaughlin,) "on a line through the centre of the partition wall, forty-two feet nine inches." It is more than probable that, when this deed was made, the defendants believed that they owned to the centre of the partition wall, and that the land of Higgins began at a line drawn through this centre. They therefore definitely made that line the boundary of the land conveyed, and although it is now shown that the land of Higgins included the whole wall, the words which define this line control and govern in their attempted grant. It is not necessary, in order to reach this conclusion, to invoke the

familiar rule that the words in a deed, where there is ambiguity, are to be taken most strongly against the grantor.

2. A witness at the trial was asked whether he had made "estimates of the expense of erecting the present building upon the lot as it is described in the deed to the plaintiff, and also an estimate of the expense of erecting on the land which the plaintiff actually owns; that is, throwing out the one half of the partition wall and land under it, so as to get at the difference between these two expenses." The witness was permitted to answer this, subject to the defendants' exception. What the reply was is not stated, nor, if this was the sole question and answer on this point, can it have been of the slightest importance. Whether he had or had not made estimates was of no consequence, in any aspect of the case, unless he afterwards testified as to them. There is nothing to show that he did, or that the inquiry went any further. Exceptions to a question to a witness cannot be considered, which do not show how the question was answered, and that such answer was in some way unfavorable to the party excepting. *Kershaw v. Wright*, 115 Mass. 361. *Pennock v. McCormick*, 120 Mass. 275.

3. It appeared at the trial, that the plaintiff, before her eviction from the four-inch strip of land, had erected on the partition wall, to the extent of the four inches which she claimed to own, an additional story, which she was afterwards compelled by McLaughlin to remove. This was done after she had received notice, and during the pendency of a bill in equity to restrain her from building on the wall. The defendants asked the court to rule that she could not recover for the value of this new and additional structure. The court properly ruled that, "if the plaintiff acted in good faith in the erection of that additional story, believing that she was the owner of this strip of land, as well as the other land, about which there is no dispute, in assessing damages the jury should give the plaintiff the value of that portion of the structure which stood upon this strip of land, and that value would not be simply the value of the material, having in view how that part of that structure was related to the rest of the building upon the land."

The general rule for damages in case of an eviction of a grantee by a paramount title, when there is a covenant of warranty,

has long been settled to be the value of the estate at the time of the eviction, including therein the value of the improvements which the evicted tenant has placed upon the land. *Gore v. Brazier*, 3 Mass. 523, 543. *Norton v. Babcock*, 2 Met. 510, 518. *White v. Whitney*, 3 Met. 81. Nor should any exception be made to this, as the defendants urge, because before the tenant had completed her improvements a bill in equity to restrain her had been brought by McLaughlin, claiming to be the owner of the land. She had a right to rely upon the defendants' warranty, to believe that the estate conveyed was lawfully hers, and, acting in good faith, to proceed with her improvements. *Boyle v. Edwards*, 114 Mass. 373.

4. The ruling that there was no covenant in the deed to the plaintiff, that the intermediate wall was a party or partition wall, was given at the defendants' request. It cannot have injured the defendants that the court added that the plaintiff had acquired certain rights by prescription to the use of the wall for the old building. The report of the case of *McLaughlin v. Cecconi*, *ubi supra*, was in evidence.

5. The defendants urge that the court erred in refusing to instruct the jury that the wall, which was a four-inch wall, could not be used for building purposes, "and that the plaintiff could not recover of the defendants any damages for loss of building rights on said wall." St. 1885, c. 374, §§ 44-46. It is not quite clear what was intended by this request. The statute referred to requires that walls for buildings of thirty feet in height shall be eight inches thick. The partition wall was in fact eight inches thick, although only four inches were on the land assumed to have been conveyed to the plaintiff. It does not appear that the plaintiff had claimed any damages for loss of building rights in the wall, and a correct rule had already been given to the jury as to the damages to which the plaintiff was entitled. Apparently the defendants desired to have the court inform the jury that a wall four inches in width only could not be used for the construction of a building as high as that of the plaintiff. It was in this sense that the court understood it, and the fair interpretation of the judge's remark on this subject is, that such is the case, but that it does not therefore follow that the land is not of substantial value. *Exceptions overruled.*

ABBY D. PEASLEE vs. BYRON L. PEASLEE & others.
BYRON L. PEASLEE & others vs. ABBY D. PEASLEE.

Essex. November 8, 1887. — June 19, 1888.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Marriage — Divorce — Jurisdiction — Notice — Service — Presumption — Husband and Wife — Antenuptial Contract — Dower — Jointure — Fraudulent Representation — Waiver — Election — Ratification — Evidence — Admission — Record Title — Release — Equity Practice — Practice — Condition — Judgment.

Under the St. of 1870, c. 404, § 3, providing that decrees of divorce *nisi* might be made absolute, no new service was necessary to found jurisdiction for such supplementary proceedings.

On the issue whether a woman's signature to an antenuptial contract was procured by fraud, she testified that her intended husband had promised to give her \$5,000 and a farm worth \$5,000; that he told her while she was reading the contract at his lawyer's office to "hurry up and read it," as his horse would not stand; that she said, "I suppose it is just as you talked," to which he replied, "Yes"; and that she thereupon signed it, knowing the contents only from what he had said, the provision for her not being what he had promised; and two other witnesses testified, one that the husband had told him that he promised to settle upon her \$10,000, of which the farm was to be a part, the other that he was going to give her that sum in money and property equally. *Held*, that her testimony would warrant a finding that she was induced to sign the contract by a fraudulent misrepresentation of its contents, and that the testimony of the other witnesses was admissible to confirm her evidence.

The antenuptial contract recited that an estate was conveyed to a trustee upon a valuable consideration, and provided that the wife should receive the rents and profits thereof during coverture, and that in lieu of dower a conveyance of it was to be made to her upon the husband's death. The marriage took place; the wife received the rents during coverture, and thereafter, in ignorance of her rights, collected a small part thereof, which she offered to return; she refused to accept a conveyance under the agreement, but did not tender a release. *Held*, on a writ of dower, that the wife could not ratify the contract during coverture, and that evidence of her acts and declarations during that time were inadmissible, that she need not return the rents received during coverture, and that those received afterwards would not conclude her. *Held, also*, that it was not necessary for her to tender a release, but that, in order to clear the record title, the filing of such a release might be made a condition of entering judgment.

THE FIRST CASE was a writ of dower, dated October 13, 1885, by the widow of Hiram Peaslee against his devisees. Plea, 1st, that the marriage between the demandant and the devisor was invalid; 2d, that an antenuptial contract between

them constituted an equitable defence to the action. Replication, that the demandant's signature to such agreement was secured by fraud. Trial in the Superior Court, before *Hammond*, J., who allowed a bill of exceptions, which, so far as material, were as follows.

It appeared in evidence that the demandant previously was married to Andrew C. Rowe, who was living on January 20, 1873, the date of her marriage to Hiram Peaslee, and that the demandant obtained a divorce from bed and board against Rowe, on November 4, 1868, in the Supreme Judicial Court holden within and for the county of Middlesex. The demandant introduced in evidence the record of that court, which recited that personal service of the demandant's libel was made upon Rowe, and that the divorce was granted to her upon his default; that on April 25, 1872, she filed a petition that the divorce might be made absolute; and that a decree was made, which, after reciting the prayer of the petition, set forth that "the petitioner appears, and the court, on this twenty-fourth day of May, A. D. 1872, do grant the prayer of said petition. It is therefore, on this twenty-fourth day of May, A. D. 1872, considered by the court that the decree of divorce from the bond of matrimony heretofore entered into between the said Abby D. Rowe and the said Andrew C. Rowe be made absolute"; but the record did not disclose any order of notice or notice to Rowe of this petition. The judge ruled that, as matter of law, the demandant was lawfully married to Hiram Peaslee.

The antenuptial contract, dated January 17, 1873, was duly executed and recorded, and after reciting the intended marriage of the parties, and that Peaslee was possessed of land described, with the buildings thereon, situated in Plaistow, New Hampshire, on the northerly side of a certain road, set forth that Peaslee, in consideration of ten dollars paid to him by the trustee, receipt of which was acknowledged, "doth hereby give, grant, bargain, sell, and convey" all that land to a trustee, upon the special trusts, "that from and after the solemnization of the said intended marriage, and during the lifetime of the said Hiram Peaslee, the said trustee shall hold the said estate to and for the sole use of the said Abby D. Rowe, and shall empower her to receive for her own use all the rents, income, and profit arising

from or out of the said trust estate ; and that in case of the decease of the said Hiram Peaslee, after the solemnization of said marriage, and during the life of the said Abby D. Rowe, the said trustee shall forthwith convey and transfer to said Abby D. Rowe, in fee simple, said trust estate, and shall execute and deliver all such deeds and instruments as may be needful to transfer the said trust estate unto the said Abby D. Rowe, her heirs and assigns forever ; and she stipulates and agrees to receive said transfer, and the same shall be in full satisfaction of her dower, or thirds, which she may claim to have in any lands, tenements, or hereditaments whereof or wherein he, the said Hiram Peaslee, shall at any time during his life be seised or possessed."

The demandant testified, that in April, 1872, Peaslee, when he proposed marriage to her, promised to give her \$5,000 and a farm worth \$5,000 ; that he pointed out to her, as the farm that he proposed to give her, a farm at Plaistow, consisting of lands on both sides of the road, as well as other land in the vicinity, and said that he had once sold this farm for \$5,000, afterwards buying it back and laying out a large sum in repairs on it ; that, at the time the agreement was signed by Peaslee and herself, the demandant had no knowledge of its contents except from statements by Peaslee ; that she began to read it at his lawyer's office, to which he had taken her, and had read not quite half of it, as she thought, when Peaslee, who was walking the floor and looking out of the window, remarked that his horse would not stand, and told her to "hurry up and read it as soon as you can" ; and that she said to him, "I suppose it is just as you talked," and he said, "Yes," and she signed it. There was evidence that the entire farm was worth about \$1,600, and that the portion described in the antenuptial agreement was a part only of the farm, on the northerly side of the road ; that the statements of Peaslee as to the value of the farm were false, and that the portion described in the agreement was worth less than \$1,000.

Isaac C. Pear testified that the demandant told him, in a conversation had with her after the engagement, that she had had a proposal of marriage from Peaslee, and that Peaslee proposed to make a settlement upon her ; that Peaslee then came into the

room, and joined in the conversation; and that Peaslee said that he proposed to settle on her \$10,000, of which the farm in Plaistow was to be a part. Ellen I. Smith testified that Peaslee told her, but not in the demandant's presence, that, "if he married Mrs. Rowe, he was going to give her ten thousand dollars in money; he was going to give her five thousand dollars in money and five thousand in property, the farm included, I supposed." The tenants objected to the admission of this evidence; but the judge admitted it, saying he would leave it to the jury to say whether this was an expression of intention, or the admission of an oral contract already made, and that, so far as it was a mere expression of his intention, the jury should disregard it.

The tenants contended that, if the demandant's signature to the antenuptial contract was obtained by fraud, she had ratified and confirmed it after a full knowledge of its contents and effect, and offered evidence of various acts and declarations of the demandant's, extending from her marriage with Peaslee until after his death, and tending to show such a ratification. This evidence tended to show, among other things, that the demandant, during coverture and after she knew the contents of the antenuptial contract, took possession of the farm in Plaistow, orally leased it, took the rents and profits, paid the taxes, and tried to sell it; and that the demandant having in writing, on October 27, 1875, consented to separate from Peaslee, and agreed for \$5,000 never to call on him for further assistance, Peaslee, on October 29, 1875, made a promissory note payable to one as trustee, from whom he took a declaration of trust of even date, reciting that the note was to be held for the benefit of the demandant during Peaslee's life, and that, at his decease, the amount was to be collected from his estate and paid to her, if then his widow. The judge excluded all evidence of acts or declarations during coverture tending to show such ratification. All the acts and declarations of the demandant after the death of Peaslee tending to show ratification were admitted, and instructions as to their effect were given, which were not excepted to.

The tenants offered evidence tending to prove that, at the time of Hiram Peaslee's death, there was a tenant occupying the house and using the furniture of the demandant, and that

the demandant collected rent on account of the house and furniture for the month following his death ; that at the time she collected it, she had no knowledge or information that she would thereby forfeit her right of dower, and that she was ready and willing to pay the money into court, for the benefit of whomsoever it might concern ; and during the trial the demandant tendered to the tenants' counsel, and paid into court, the sum of eighteen dollars, which was more than the amount received for the rent of the house and the use of the furniture, and interest on the same.

The tenants introduced evidence tending to prove that the trustee under the antenuptial agreement died before Hiram Peaslee ; that an administrator of such trustee's estate was duly appointed, who after Peaslee's death duly obtained a license to convey the estate contemplated by the agreement to the demandant ; that a deed duly executed by such administrator was tendered, at the tenants' request, to the demandant, and refused by her. Section 10 of the General Statutes of New Hampshire, of 1878, c. 205, put in evidence by the tenant, was as follows : "When any person deceased shall, at the time of his death, hold any real estate in trust for the use of another, and there is no dispute as to the trust or title of the deceased therein, the judge for the county in which such real estate is situate, upon application and notice, may license the executor or administrator of such deceased person to convey such real estate to the person for whose use the same was holden in trust by the deceased, or to such other person as may be designated by said judge."

There was evidence that Hiram Peaslee died on July 11, 1885, testate ; that his will contained the following clause : "I make no provision, in this my last will, for my wife, Abby D. Peaslee, because I have provided for her in an antenuptial contract and deed, dated January 17th, A. D. 1873" ; and that the demandant filed a waiver of the provisions of his will on August 6, 1885, and made a demand for dower on August 29, 1885 ; but there was no other evidence of a rescission or of an election to waive the contemplated contract, or that the demandant had ever offered to release her rights under it to the devisees, or requested the trustee to do it.

The tenants requested the judge to instruct the jury, in substance, that upon all the evidence the demandant could not recover; that there was no valid marriage between the demandant and Peaslee; that there was no evidence of an election by the demandant to waive the jointure; that the contract was not absolutely void, but voidable; that the contract was not voidable at law for the fraud alleged by the demandant; that the demandant could not avoid the antenuptial contract for fraud, without first having returned all the benefits that she had received under it; and that the agreement could be ratified during the marriage.

The judge refused so to instruct, but gave instructions that were not excepted to, save so far as they were inconsistent with the instructions requested. The jury answered the question, "Was the demandant induced to sign the antenuptial contract by the fraud of her intended husband, Peaslee?" in the affirmative, and returned a verdict for the demandant; and the tenants alleged exceptions.

THE SECOND CASE was a bill in equity, brought by the devisees of Hiram Peaslee to restrain his widow from prosecuting her action at law because of the antenuptial contract. The defendant demurred for want of equity. *C. Allen, J.*, sustained the demurrer; and the plaintiffs appealed to the full court.

H. Carter & B. B. Jones, for the widow.

C. U. Bell & W. H. Moody, for the devisees.

HOLMES, J. The first case is a writ of dower brought by Abby D. Peaslee as the widow of Hiram Peaslee, against his devisees. The tenants deny the validity of the marriage, and set up an antenuptial contract by way of equitable defence. The second case is a bill in equity brought by the tenants, to enjoin the action at law against them, on the ground of the same antenuptial agreement. It comes here upon appeal from a decree sustaining a demurrer, but the bill is not pressed, unless it is necessary to protect the tenants' equitable rights, and as the facts were tried in the action at law and all the questions sought to be raised are raised there, we shall confine our discussion to the latter. St. 1883, c. 223, § 14. *Freeland v. Freeland*, 128 Mass. 509, 512.

The first question raised is whether the demandant's marriage to Hiram Peaslee was valid. She had been married previously to one Rowe, who was living at the time of her marriage to Peaslee in 1873. She obtained a divorce from bed and board against Rowe on November 4, 1868. On April 25, 1872, she filed a petition to make the decree absolute, and on May 24, 1872, a decree was passed purporting to make absolute the divorce from the bonds of matrimony. The record shows personal service of the libel on Rowe, and a default by him, but discloses no order of notice or notice to him of the petition.

The proceeding on the petition was under St. 1870, c. 404, which did away with divorce from bed and board, enlarged the number of causes of divorce from the bonds of matrimony, and enacted that, if the libellant prevailed, the court should enter a decree of divorce *nisi*, and that, if the parties should continue to live separately for five consecutive years next after the decree, the court should, upon proof thereof, make said decree absolute, and might make it absolute after the parties had lived apart three consecutive years. The first section provided that all persons then divorced from bed and board should be in the same legal condition as if divorced *nisi* under that act, and this provision, it will be seen, applied to the demandant.

The validity of the provision is established. *Bigelow v. Bigelow*, 108 Mass. 38. *Graves v. Graves*, 108 Mass. 314, 320. See *Jacquins v. Commonwealth*, 9 Cush. 279. The petition to make the decree absolute "takes the place of the libel under the General Statutes [c. 107, § 10] for a divorce from the bond of matrimony after parties divorced from bed and board had continued to live apart for the requisite time." *Graves v. Graves*, *ubi supra*. But in this case and in others, the proceeding is spoken of as a new one, upon which the court always ordered notice to the other party. *Garnett v. Garnett*, 114 Mass. 379, 380. *Sparhawk v. Sparhawk*, 116 Mass. 315, 319. And practically it was dealt with as such, being entered as a new cause, and the records in some counties, although not, we believe, in all, disclosing an order of notice and hearing. Everywhere, of course, the original papers, when complete, show an order of notice, and generally show a compliance with it, either by return or by affidavit, as the case may be.

But when we have to consider whether a divorce accepted by the parties, and on the faith of which the marriage under consideration took place, shall be declared void, at the suggestion of a stranger, for want of jurisdiction, because the record and papers found on file do not show such notice to have been given, the question assumes a different aspect.

It is true, that in practice the proceeding was dealt with as a new one. But this was not necessarily due to any other cause than the length of time intervening between the decree *nisi* and the proceeding to make the decree absolute. Under St. 1870, c. 404, the time to elapse was not less than three or five years, and therefore the old cause went off the docket. But it must be kept in mind that the provisions of that statute were primarily provisions for making absolute decrees *nisi* also made under that statute, and that the further clause giving persons divorced from bed and board the same status as if divorced *nisi* under the statute, was an independent matter on one side. The question how far and in what sense the proceeding was a new one must be discussed with reference only to the proceeding to make absolute a decree *nisi* under the statute.

It seems to us that, by the very terms of the statute, it was a proceeding in the original cause, to make the original decree absolute. The words are, "shall make said decree absolute." Under the earlier statute of 1867, c. 222, when the decree *nisi* was to be made absolute after six months, the cause was continued, and the final decree appeared as part of the original record. The same is true under the present St. 1882, c. 223. There is no such difference in the language or provisions of the act of 1870 as to warrant a different interpretation. The statute does not even say anything about notice, and the language of the court in the cases cited does not purport to be a construction of the statute, but a statement of judicial practice. As the fact that the parties had lived separately was to be proved, and as other grounds for refusing to make the decree absolute might exist, it was very proper to require notice of the application, so that the other party might be present at the hearing if he saw fit, although under the act of 1882, while a petition is always filed, notice is expressly dispensed with by the act, and the burden is thrown on the objecting party of taking his objection in time.

But it is one thing to say that notice will be required on judicial grounds, and another to say that service, or its equivalent, was necessary to found jurisdiction. If the latter had been necessary, it would have been a question for consideration whether a decree could ever have been made absolute without personal service, as the statute, saying nothing about service or notice, of course did not provide expressly for service by publication, although no doubt it might have been held impliedly to adopt the modes of service authorized in the original cause. *Blackinton v. Blackinton*, 141 Mass. 432. However this may be, we are of opinion that the proceeding to make a decree *nisi* under the act of 1870 absolute was a continuation of the original proceedings, and that jurisdiction acquired by personal service in the original cause continued until the decree was made absolute. We think that the grounds for this opinion are at least as strong as those on which it has been held that *scire facias* against a trustee is a continuation of the original proceeding, and therefore that a Massachusetts judgment on *scire facias*, without personal service against a trustee who was served in the original action, is conclusive in another State. *Adams v. Rowe*, 2 Fairf. 89. See *Nations v. Johnson*, 24 How. 195, 205.

If our conclusion is right as to proceedings wholly under the act of 1870, it must govern the present case. As we have said, the validity of the act as applied to existing divorces from bed and board is established by decision. The only effect of our construction is, that a new service was not necessary to found jurisdiction for the supplementary proceedings. But it was patent on the face of the statute that no service was expressly required, and that fact must have been before the mind of the court when making the decisions which we have cited, and it was as obvious then as now that judicial practice could not impart validity to the act if it was not valid without such aid.

However, as the statute was not considered in quite the same light in which it now is presented, we may add that, even if an independent petition *ex parte* had been allowed, it would be hard to see what rights of parties domiciled here would have been impaired, (*Pierce v. Burnham*, 4 Met. 303,) or what greater objections could be urged than can be urged against divorces without service or personal notice of the institution of the suit. *Burlen*

v. *Shannon*, 115 Mass. 438. *Pennoyer v. Neff*, 95 U. S. 714, 735. *Cheely v. Clayton*, 110 U. S. 701, 705.

But the statute did not go to that extent. It did not throw on the party concerned the burden of watching the dockets of all competent courts for a new entry. It simply threw on him, by a statute which he was presumed to know, the burden of noting in a cause to which he was a party his desire to be heard in opposition to the making of a decree. We think it clear, that it was no more necessary, under the statute of 1870, than it is at present, to await the filing of a petition in order to file objections to the decree being made absolute.

If we could construe the act of 1870 as by implication requiring notice, we should be inclined to think that it might be presumed that notice was given, without contravening any general proposition as to proceedings not according to the course of the common law. *Commonwealth v. Blood*, 97 Mass. 538. See *Henry v. Estes*, 127 Mass. 474, 475. The court had jurisdiction of the subject matter, and was the court of the parties' domicile. The justice who made the decree absolute was a member of the bench which stated the practice to be that the court always ordered notice. All the reasons which justify a presumption of jurisdiction in other cases seem to be present here. In *Edds, appellant*, 137 Mass. 346, it was presumed that the Probate Court had satisfied itself, outside the return, that service had been made or ordered. In *Huntington v. Charlotte*, 15 Vt. 46, domicile of the parties was presumed in support of the jurisdiction to grant a decree of divorce. See *Grignon v. Astor*, 2 How. 319, 340; *Waltz v. Borroway*, 25 Ind. 380; *Innerarity v. Byrne*, 5 How. 295.

The other questions relate to the antenuptial agreement.

It is enough to say, without more detail, that there was some evidence that the demandant's intended husband induced her, by what might have been thought a pretence, to sign the paper before she had read it through; that she said, "I suppose it is just as you talked," that he said, "Yes," that she believed him and signed it, knowing the contents only from what he said; and that in fact the provision for her was not what he had promised in the talk referred to. This evidence, if believed, warranted a finding that the demandant was induced to sign the paper by a fraudu-

lent misrepresentation of its contents. See *Kline v. Kline*, 57 Penn. St. 120.

Hiram Peaslee's alleged conversations with the witnesses Pear and Smith, fairly construed, imported an arrangement with the demandant such as she had testified to, or at least might have been found to have had that meaning, and were therefore admissible in support of that part of her testimony to make out a case of fraud. The jury were instructed to disregard them so far as they were mere expressions of intention. See *Camerlin v. Palmer Co.* 10 Allen, 539, 542.

It will not be necessary to consider whether the fraud alleged would have made the agreement voidable or void, nor whether the provision in lieu of dower would be a legal, or only an equitable bar. We shall assume that the instrument was capable of confirmation, at least, and that if confirmed it would be a bar in equity, if not at law.

But we are of opinion that the demandant could not ratify the instrument during coverture. If the provision would have been a legal bar, her power to accept such a provision was governed by statutes which have not been affected by the enlargement in other directions of the powers of married women. See *Mason v. Mason*, 140 Mass. 63. Under the Pub. Sts. c. 124, § 9, she could not bar her dower during coverture by any expressions of assent to a provision made for her at that time. See *Bigelow v. Hubbard*, 97 Mass. 195. It can make no difference whether the instrument was made before or during coverture. The policy of the law is directed, not against the husband's drawing the instrument, but against the wife's concluding herself by accepting it while under marital influence. If she cannot accept a provision made at one time, she cannot accept one made at another. See *Smith v. Lucas*, 18 Ch. D. 531, 544.

This principle of policy is equally applicable to cases not strictly within the statute as to those within its letter. It applies as fully to the ratification of an instrument which purports to have been assented to before marriage, but which the wife has a right to avoid, as to one which is presented to her for the first time after marriage. If the jointure should be deemed an equitable one, it would be governed by the same rule. In this particular, equity would follow the law.

It follows from what we have said, that the court was right in rejecting evidence of acts and declarations during coverture tending to show ratification at that time. It is true that a part of the evidence rejected was of the giving of a note to a trustee for the demandant, coupled with a written assent on her part. But there was no offer to show that she sought to compel the trustee to retain the note after her husband's death, or any offer otherwise to make the receipt of the property the foundation for proof of ratification when the demandant was able to ratify. It is suggested that the acts during coverture were admissible to show the character of the acts after coverture. But the acts of the demandant during coverture, being acts of a person incompetent so to act with legal effect, had no character, and could not be used for adjective any more than for substantive purposes; otherwise the rule which we have laid down would be evaded by a very simple device. See *Lowell v. Daniels*, 2 Gray, 161; *Pierce v. Chace*, 108 Mass. 254, 259.

But it is argued, and the court was requested to instruct the jury to that effect, that the demandant could not rescind the antenuptial contract without returning all the benefits which she had received under it. The benefits referred to are the marriage itself, certain rents received by the demandant during coverture, a few dollars collected afterwards in ignorance of her rights, which she offered to return at the trial, and the estate or interest purporting to be conveyed by the indenture.

Assuming that the marriage was, in any technical or practical sense, founded in part upon the contract as consideration, it would be pushing *Snow v. Alley*, 144 Mass. 546, to undreamed of consequences, were we to hold that the statute bar of dower is irrevocably fixed if a man by any fraud can get his intended wife to execute an antenuptial agreement, or what turns out to be one, and to marry him before she discovers the fraud. In *Johnston v. Johnston*, 53 L. J. Ch. 1014, affirmed 52 L. T. (N. S.) 76, the fraud alleged was fraud directed to and inducing a marriage. The settlement made by the husband could only be reached through the marriage, and while the marriage stood the settlement stood. It was intimated that after marriage a settlement could not be avoided for fraud, but some of the American decisions that a fraudulent jointure can be set aside after marriage

were referred to, and seem to have been thought by the Court of Appeal entirely consistent with their intimation. *Kline v. Kline*, *ubi supra*. *Kline's estate*, 64 Penn. St. 122. *M'Cartee v. Teller*, 2 Paige, 511.

The right of dower can be barred only by meeting the requirements of the statute in substance as well as in form, and the cases show that, even when the fraud goes only to the motives for signing, and not to the identity of the instrument, marriage does not cut off the right to rescind, and that, although the marriage is irrevocable, yet, as was said in answer to a proposition not more startling than the one we are discussing, "that account is *in equilibrio*." *Price v. Sears*, 2 Lowell, 553. See *Rau v. Von Zedlitz*, 132 Mass. 164, 169.

Then as to the rents collected during the marriage. It will be observed that the instrument under consideration contains two distinct sets of provisions, which are as independent of each other as if contained in separate documents. There is a gift of the rents and profits in trust for the wife during coverture, which may be regarded as a marriage settlement, and there is a provision that the legal estate shall be conveyed to her upon the husband's death, which is the proposed jointure. It is "said transfer," that is, the conveyance after his death, which the wife accepts in satisfaction of dower. The rejection of this provision does not involve the rejection of the independent gifts during coverture, and therefore does not require a return of the rents received during that period.

The collection of a few dollars by the demandant after her husband's death, in ignorance of her rights, if it stands on a different footing from the previous receipt of rents, and the fact that the amount was not formally tendered back until the trial, did not necessarily conclude her. *Watson v. Watson*, 128 Mass. 152. *Smith v. Holyoke*, 112 Mass. 517. *Rau v. Von Zedlitz*, 132 Mass. 164. The bill of exceptions states that all acts tending to show ratification after her husband's death were submitted to the jury with proper instructions.

The alleged jointure is pleaded as an equitable jointure only, and seems to have purported to convey only an equitable estate by the law of New Hampshire, so far as we can rely upon the proceedings under the New Hampshire statute put in evidence

by the tenant. Apart from local statutes, we cannot assume that the law of New Hampshire is different upon this question from that of Massachusetts, and by the law of Massachusetts the use would not be executed under a similar instrument. The trust is for a married woman. The intent manifested by the instrument is that the legal title should remain in the trustee until the death of the grantor, and the demandant is then to acquire a title only by conveyance. Also a consideration purports to have been given by the trustee sufficient to raise a use in him. See *Ayer v. Ayer*, 16 Pick. 327; *Richardson v. Stodder*, 100 Mass. 528; *Hastings v. Merriam*, 117 Mass. 245, 252; *Chapin v. Chicopee Universalist Society*, 8 Gray, 580; *Stearns v. Palmer*, 10 Met. 32, 35; *Mott v. Buxton*, 7 Ves. 201.

If the demandant lawfully refused to accept a conveyance tendered her in pursuance of the terms of the agreement, and repudiated the agreement, there was no need for her to go further and to tender a reconveyance. The instrument being void by her election, if not before, it is hard to see why a release should have been necessary, even if it had purported to convey a legal title. *Somes v. Skinner*, 16 Mass. 348, 357. *Somes v. Brewer*, 2 Pick. 184, 191. *Chandler v. Simmons*, 97 Mass. 508. Still more when the instrument, if valid, would give a mere equitable right to a conveyance, which, strictly speaking, is only a *jus in personam*, (*Western Union Telegraph Co. v. Caldwell*, 141 Mass. 489, 492,) and which, if sought to be enforced, would be met by the answer that she had elected against the instrument, and that the trustee no longer held the property in trust for her. But in order to clear the record title, it may be made a condition of dismissing the bill, and of ordering judgment for the demandant, that she file a release of all her rights under the instrument.

Exceptions overruled, and bill dismissed.

GEORGE B. ADAMS vs. WILLIAM T. MESSINGER.

Middlesex. February 2, 1888. — June 19, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

*Equity — Specific Performance — Personal Property — Sale — Divisible Contract
— Part Performance — Letters Patent — Foreign Application — Assignment.*

Specific performance of an agreement by the owner of a patent to furnish and deliver the patented article will be decreed, if it does not appear that any special or peculiar skill is required to make it.

If such owner further agrees that, if he makes improvements in the article and receives letters patent therefor here, he will apply for letters patent in Canada, will assign them if obtained, and will not prejudice them or the monopoly secured, he may be specifically ordered to assign his title to such improvements as to Canada, and enjoined from alienating or incumbering it.

BILL IN EQUITY, filed March 15, 1887, alleging that the defendant, who was the owner of letters patent of the United States, and the plaintiff, who was the owner of similar letters patent of the Dominion of Canada, executed the following instrument under seal.

“Memorandum of agreement made this sixth day of May, 1886, between William T. Messinger and George B. Adams, both of Cambridge, Massachusetts, which witnesseth as follows:

“Said Messinger agrees to furnish and deliver to said Adams, within three months from this date, one perfect working injector of the sizes one, two, three, four, five, and six, in place of the same number of said machines now in possession of said Adams, the said injectors to be tested under the following conditions, viz.: to be connected with street water-main and steam pressure varying from twenty to one hundred and fifty pounds; to lift from four to twenty feet steam pressure varying from twenty to one hundred and fifty pounds. Upon delivery of said injectors, so tested, said Adams agrees to pay said Messinger (\$500) five hundred dollars in cash.

“Said Messinger further agrees to furnish and deliver to said Adams, within six months from this date, one perfect working injector of sizes seven, eight, nine, ten, and twelve, which shall

be tested under the same conditions as numbers one, two, three, four, five, and six, and also to permit said Adams to copy any drawings which said Messinger may make, or have made, of any of said sizes of injectors or alterations therein. Upon the delivery of said injectors, so tested, said Adams agrees to pay said Messinger for said sizes seven, eight, nine, ten, and twelve the list price according to catalogue now printed, with eighty per cent discount, and surrender to said Messinger his promissory note for \$181.13, to order of George B. Adams, dated of even date herewith. The foregoing tests shall be made in presence of said Adams, or some person appointed by him for that purpose.

“By the term ‘injector’ in this agreement is meant the W. T. M. injectors for steam boilers made under and according to letters patent of the Dominion of Canada issued to said Messinger, dated August 1, 1884, and numbered 19,876, dated September 8, 1884, and numbered 20,162, and dated September 8, 1884, and numbered 20,164, and similar letters patent of the United States.

“Any and all improvements that said Messinger may make in injectors for steam boilers shall be, so far as the Dominion of Canada is concerned, for the benefit of said Adams, and whenever said Messinger shall take out any letters patent of the United States for said injectors for steam boilers, he or his heirs or assigns shall forthwith apply for letters patent of the Dominion of Canada, and upon receiving the same shall immediately, without any further consideration, assign and convey the same to said Adams or his legal representatives, and further that in any business or operation he may engage in under letters patent of the United States, or in any other business, he will not directly nor indirectly do any act to the prejudice of the said letters patent of the Dominion of Canada, or the monopoly thereby secured.

“Witness our hands and seals the day and year first above written.

Wm. T. Messinger. (L. s.)

Geo. B. Adams. (L. s.)”

The bill also alleged, that the defendant, since the date of the agreement, had taken out letters patent of the United States for improvements in such injectors, viz. Letters Patent No. 350,545,

No. 350,546, and No. 350,547, all bearing date October 12, 1886; that the plaintiff had always been ready, and had offered specifically, to perform the above agreement on his part; that the plaintiff had frequently applied to the defendant, and requested him to perform the agreement on his part, but he had refused and neglected to perform the same, or any part thereof; and that by reason of the peculiar nature and construction of such injectors, of which the defendant was the inventor, the plaintiff had been unable to supply himself therewith elsewhere, but could only obtain them at the hands of the defendant, and had suffered great and peculiar and unusual damage by reason of the defendant's refusal to furnish them, and by reason of the defendant's refusal to apply for and assign to him Canadian letters patent.

The prayer of the bill was, — 1st, that the defendant might be decreed specifically to perform the agreement, and that for the purposes aforesaid all proper directions might be given and inquiries made; 2d, that there might also be an assessment of the damages sustained by the plaintiff by reason of the defendant's neglect to perform his agreement, and that the defendant might be ordered to pay the same; and, 3d, that in the mean time the defendant might be restrained from alienating or encumbering his right to letters patent of the Dominion of Canada.

The defendant demurred to the bill on the following grounds: "1. That the plaintiff has not stated such a case as entitles him to any relief in equity against the defendant. 2. That the plaintiff has a plain and adequate remedy at law. 3. That the agreement, specific performance of which the plaintiff prays may be decreed, is a contract for personal services. 4. That the specific performance, which the plaintiff prays may be decreed, requires the exercise of mechanical skill, intellectual ability, and judgment. 5. That the specific performance of said agreement involves the building of a machine embodying a patent. 6. That the securing of letters patent in Canada involves the action of officers of a foreign government, and cannot be the subject of an order for specific performance. 7. That it does not appear by said bill what relief the plaintiff prays for, and the plaintiff's bill is entirely indefinite and uncertain."

W. Allen, J., sustained the demurrer; and the plaintiff appealed to the full court.

C. S. Knowles, for the defendant.

W. B. Durant, for the plaintiff.

DEVENS, J. It is the contention of the defendant, that the plaintiff has a full, complete, and adequate remedy at common law by an action for damages, and that the court sitting in equity cannot grant the relief sought by the prayer of the bill.

The controversy arises from the failure to perform an executory written contract. So far as this relates to personal property, the objections arising from the statute of frauds, which have sometimes been found to exist when oral contracts were sought to be enforced, have of course no application. The general rule that contracts as to the purchase of personal property are not specifically enforced, as are those which relate to real property, does not rest on the ground of any distinction between the two classes of property other than that which arises from their character.

Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract. Story Eq. Jur. § 717. *Clark v. Flint*, 22 Pick. 231. A contract for bank, railway, or other corporation stock freely sold in the market, might not be thus enforced, but it would be otherwise where the stock was limited in amount, held in a few hands, and not ordinarily to be obtained. *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300. *Treasurer v. Commercial Mining Co.* 23 Cal. 390. *Poole v. Middleton*, 29 Beav. 646. *Doloret v. Rothschild*, 1 Sim. & Stu. 590. See *Chaffee v. Middlesex Railroad*, 146 Mass. 224.

Where articles of personal property are also peculiar and individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities,

family furniture, or heirlooms, specific performance of a contract in relation to them will be decreed. *Lloyd v. Loaring*, 6 Ves. 773. *Fells v. Read*, 3 Ves. Jr. 70. *Lowther v. Lowther*, 13 Ves. 95. *Williams v. Howard*, 3 Murphey, 74. An agreement to assign a patent will be specifically enforced. *Binney v. Annan*, 107 Mass. 94. Nor do we perceive any reason why an agreement to furnish articles which the vendor alone can supply, either because their manufacture is guarded by a patent or for any similar reason, should not also be thus enforced. *Haggood v. Rosenstock*, 23 Fed. Rep. 86. As the value of a patent right cannot be ascertained by computation, so it is impossible with any approach to accuracy to ascertain how much a vendee would suffer from not being able to obtain such articles for use in his business.

The contract of the defendant was twofold, to furnish and deliver certain described working steam injectors within a specified time to the plaintiff, and also that, if the defendant shall make improvements in injectors for steam boilers, and shall take out patents therefor in the United States, he will apply for letters patent in Canada, and on obtaining them will assign and convey the same to the plaintiff, and that he will not do any act prejudicial to these letters patent of Canada or the monopoly thus secured.

It is said that the court will not enforce a contract for personal services when such services require the exercise of peculiar skill, intellectual ability, and judgment, and therefore that the defendant cannot be ordered to make and deliver the injectors contracted for. But the principle on which it is held that a court of equity cannot decree one to perform a personal service involving peculiar talent or skill, because it cannot so mould its order and so supervise the individual executing it that it can determine whether he has honestly obeyed it or not, has no application here.

The defendant has agreed to furnish and deliver certain injectors, which the contract shows to be patented articles. It does not appear from the bill that they were yet to be made when the contract was executed. But if it be assumed that they were, there is nothing from which it can be inferred that any skill peculiar to the defendant was required to construct them. For aught that appears, they could be made by any

intelligent artificer in the metals of which they are composed. The details of their manufacture are given by reference to the patents which are referred to in the agreement, so that no difficulty such as has sometimes been experienced could have been found in describing accurately, and even minutely, the articles to be furnished. Nor are there found in the case at bar any continuous duties to be done, or work to be performed, requiring any permanent supervision, which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of a contract by the court.

Agreements to make an archway under a railway, or to construct a siding at a particular point for the convenience of the landowner, have been ordered to be specifically enforced. Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them, and although the work to be done necessarily involved engineering skill as well as labor, he was not bound to assume the responsibility or the labor of doing that which the defendant had agreed to do. *Storer v. Great Western Railway*, 2 Yo. & Col. Ch. 48. *Greene v. West Cheshire Railway*, L. R. 13 Eq. 44. The case at bar is readily distinguishable from that of *Wollensak v. Briggs*, 20 Bradw. (Ill.) 50, on which the defendant much relies. In that case, the defendant was to construct for the plaintiff certain improved machinery for a particular purpose, but no details were given as to the form, structure, principle, or mode of operating the proposed machine. It was obviously a contract too indefinite to enable the court to order its specific enforcement.

It is urged that specific performance of a part only of a contract will not be ordered when it is not in the power of the court to order the enforcement of the whole, and that it would not be possible to enforce that portion of the contract which relates to the application for letters patent in Canada, and the subsequent assignment of them. But where two parts of a contract are distinctly separable, as in the case at bar, there is no reason why one should not be enforced specifically, and the plaintiff compensated in damages for the breach of the other.

When a contract relates to but a single subject, and it is impossible for the defendant to perform it, except partially, the

plaintiff is entitled to the benefit of such partial performance, and to compensation, if it be possible to compute what is just, so far as it is unperformed. It was therefore held in *Davis v. Parker*, 14 Allen, 94, that where one had agreed to convey land with release of dower, and was unable to procure a release of dower, the purchaser was entitled to a conveyance without such release, with an abatement from the purchase money of the value of the wife's interest at the time of the conveyance. See also *Milkman v. Ordway*, 106 Mass. 232, 253; *Curran v. Holyoke Water Power Co.* 116 Mass. 90.

We have assumed, in favor of the defendant's contention, that the only relief that the plaintiff could obtain for the breach of that portion of the agreement which relates to the application for a patent in Canada, for the improvements which the defendant had made, would be in damages. We have not intended thus to decide. That equity, by virtue of its control over the persons before the court takes cognizance of many things which they may do or be able to do abroad, while they are themselves personally here, will not be controverted. One may be enjoined from prosecuting a suit abroad. He may be compelled to convey land situated abroad, although the conveyance must be according to the laws of the foreign country, and must be sent there for record. *Pingree v. Coffin*, 12 Gray, 288. *Dehon v. Foster*, 4 Allen, 545. *Cunningham v. Butler*, 142 Mass. 47. *Newton v. Bronson*, 18 N. Y. 587. *Bailey v. Ryder*, 10 N. Y. 363.

There is nothing to show that the defendant, in making his application in Canada for the patent, is compelled to leave the State, any more than he would be compelled to do so if he was an applicant at Washington. The grant of such a patent is an act of administration only. If it were to be granted here, the party would be ordered to make application. It was held in *Runstetter v. Atkinson*, MacArthur & Mackey, 382, that where a formal assignment of an invention had not been made, but a valid agreement had been made to assign, equity would order the party to make the formal assignment, and also to make application for the patent which, in such case, would issue to the assignee. The laws of Canada, which we can know only as facts, are not before us by any allegations as to them. If all that is required by them is a formal application in writing by the

inventor, there would seem to be, from the allegations of the bill, sufficient reason why the defendant should be required to make and forward it, or place it in the hands of the plaintiff to be forwarded to the Canadian authorities.

In any event, as the application is preliminary only to obtaining letters patent for the purpose of assigning them to the plaintiff, the averments of the bill taken in connection with the terms of the agreement set forth a good reason why the plaintiff may ask an assignment of his title to the improvements in question from the defendant, so far as the Dominion of Canada is concerned, and also why the defendant should be restrained from alienating or in any way incumbering any right he may have to letters patent from Canada, if the plaintiff should decide to seek his remedy in this form, rather than in damages for breach of this part of the contract.

Demurrer overruled.

HARRY B. McKEOWN vs. J. THEODORE GURNEY.

Suffolk. March 7, 1888. — June 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Insolvent Debtor — Pending Action — Costs and Expenses — Proof of Claim — Composition — “Debt” — Appeal.

If the Court of Insolvency declines to pass upon a claim for the costs and expenses of an action pending against an insolvent debtor where the claim upon which the suit was commenced is proved against the estate, as provided in the Pub. Sts. c. 157, § 139, the only remedy is by appeal.

The “debt” referred to in the St. of 1884, c. 236, § 9, which provides that a creditor, whose debt is omitted from the debtor’s schedule in composition proceedings by mistake or want of knowledge, may recover against him, is the original debt; and if such debt has been paid, no further action will lie for the costs and expenses of an action pending for its recovery.

CONTRACT to recover the costs and expenses of an action pending against an insolvent debtor. Trial in the Superior Court, without a jury, before *Pitman*, J., who allowed a bill of exceptions in substance as follows.

The plaintiff entered the employment of the defendant as an operative in 1885, giving his residence as Boston, Mass. Afterwards the plaintiff brought an action in the Municipal Court of the city of Boston against the defendant for such services, and attached the defendant's property. After the entry of this action, the defendant petitioned himself into insolvency, and filed a schedule of his creditors, in which the plaintiff's name did not appear, but the name of H. McKewan, of Boston, Mass., did appear for the amount then due to the plaintiff for such services. Before the action was tried, the defendant suggested his insolvency in the Municipal Court, and the plaintiff for the first time had notice thereof, whereupon the case was continued, and was still pending. The attachment in that action was not dissolved until the proceedings in insolvency were begun. Under the composition statutes, the defendant paid into court an amount sufficient to pay the plaintiff's claim in full, under the name of H. McKewan. The composition was duly carried out, and the defendant received his discharge on December 4, 1885.

The last meeting of creditors for the proof of claims was held on November 5, 1885; but those creditors whose names appeared on the defendant's schedule were allowed one year from September 23, 1885, the date of the first publication of notice of the insolvency proceedings, in which to prove their claims and receive their dividends. On December 4, 1885, the plaintiff, upon hearing that the defendant had received his discharge, offered to prove his claim in the Court of Insolvency against the defendant's estate under his own name, and to receive for his services the dividend standing to the credit of H. McKewan, as well as to prove a claim for costs and expenses that had accrued in the action in the Municipal Court. The Court of Insolvency allowed the claim for the plaintiff's services, and caused to be paid to him the sum standing to the credit of H. McKewan, but refused to allow or disallow his claim for such costs and expenses.

The judge found that the plaintiff never received any notice of the meetings of the defendant's creditors, except as stated, and that the amount sought to be recovered in this action consisted of the legal fees, costs, and expenses of the action pending in the Municipal Court, and the expenses of the custody of the

property attached, and ruled, as matter of law, that the action could not be maintained, and found for the defendant; and the plaintiff alleged exceptions.

T. Curley, for the plaintiff.

S. D. Charles, for the defendant.

DEVENS, J. Although the plaintiff's name was omitted from the schedule of the defendant's creditors in insolvency, and although a discharge had been granted to the debtor and the time had expired within which claims could be proved against the estate of the defendant in insolvency except those held by creditors whose names appeared on the defendant's schedule, the plaintiff offered to prove his original claim in the name of Harry B. McKeown, and was permitted to receive the dividend which stood to the credit of H. McKewan on the defendant's schedule.

The plaintiff had brought suit in the Municipal Court of the city of Boston on his claim, and the attachment of property made therein was dissolved by the insolvency of the defendant. At the time of offering to prove his debt in insolvency, he offered to prove the claim for costs and expenses which had accrued in his action in the Municipal Court, but the Court of Insolvency declined to pass thereon. Upon this claim he now brings suit.

The Pub. Sts. c. 157, § 139, provide that, when an attachment on mesne process has been made, and is not dissolved before the commencement of proceedings in insolvency, "if the claim upon which the suit was commenced is proved against the estate of the debtor, the plaintiff may also prove the legal fees, costs, and expenses of the suit and of the custody of the property, and the amount thereof shall be a privileged debt." This is a debt created by the statute, and its existence depends upon the predicament stated in the statute, namely, that it shall have been proved as the statute prescribes. The statute creates no personal contract on the part of the insolvent to pay these costs, etc., nor does it place him under any personal liability, and the liability of his estate depends on this proof solely. If the Court of Insolvency erroneously refused to pass upon or to permit the plaintiff to prove his claim for costs, etc., his remedy was by appeal. Pub. Sts. c. 157, §§ 36-38.

The proceedings of the debtor were under the St. of 1884, c. 236, which provide for a discharge by means of a composition in insolvency. Section 9 of this statute, after authorizing the Court of Insolvency under certain circumstances to confirm the composition, and to grant a discharge, provides that the composition "shall not bar the debt of any creditor whose name was fraudulently and wilfully omitted from the debtor's schedule of creditors. But the debt of any creditor omitted therefrom only through mistake or want of knowledge shall be barred, and he shall be entitled to and may recover against the debtor the amount of the dividend to which he would have been entitled in the composition proceedings."

The contention of the plaintiff is, that whether the debt due him was omitted fraudulently or by mistake from the schedule, which latter is the more favorable view, this omission enables him to recover the full amount of his claim for costs, etc., as a privileged debt. The original debt due to the plaintiff, however, which was for labor and services, has ceased to exist. It was offered in the name of Harry B. McKeown, and has been paid in full. The claim for costs, etc., was only supplementary thereto. Whether, if the plaintiff were now able to bring suit on his original debt, either because the same was fraudulently or by mistake omitted by the defendant from his schedule, it would be possible, in view of the language of the statute, to hold that he might maintain his claim for legal costs, etc., as supplementary thereto, upon the ground that the negligence or fraud of the debtor had deprived him of his right to prove the costs, etc., as well as the original debt, or whether a more literal construction of the statute should be followed, need not now be discussed.

The debt referred to in the St. of 1884, c. 236, § 9, is the original debt; and when this cannot be enforced by suit, that which is purely incidental thereto, or which may be made incidental by a decree of the court, cannot be enforced.

Exceptions overrule.

BYRON A. OSGOOD vs. THOMAS F. MCGANN.

THOMAS F. MCGANN vs. BYRON A. OSGOOD.

Suffolk. March 7, 1888. — June 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Contract — Construction — Evidence — Instructions to Jury.

An agreement for the manufacture of cash cars, "according to the style" of a certain plan, contained minute directions for their construction, and provided that the wheels should be made of the "best quality of B. metal." An indorsement thereon of later date set forth that, by the consent of both parties, reference was to be had for the "form and style" to a model car instead of to the plan. In an action for breach of the agreement, the evidence of experts as to the meaning of the words "best quality of B. metal" was conflicting. *Held*, that an instruction to the jury, that they might find that the parties adopted the metal of the wheels of the model car as that called for by the agreement, was, in the absence of sufficient evidence of such an adoption, erroneous.

TWO ACTIONS OF CONTRACT, upon an agreement under seal, dated July 10, 1883, and signed by Thomas F. McGann and by Byron A. Osgood, who did business under the name of the Osgood Cash Car Company, by which McGann "agrees to manufacture one thousand cash cars, to be made and finished in good substantial and workmanlike manner, . . . said cars to be made according to the style shown on a sketch or plan marked A, hereunto annexed; the wheels are to be three inches in diameter, and made of best quality of Babbitt's metal and nickel-plated." Osgood agreed to pay two dollars and a half for each car so made and delivered. This agreement contained minute specifications as to the material to be used in the rest of the car, and as to the method of manufacture, and bore the following indorsement:

"Boston, July 30, 1883. The plan described in the within contract, marked A, is omitted by consent of both parties, and for further description, for the form and style referred to, is shown in the style and form of the cars now in process of manufacture by Thomas F. McGann for the Osgood Cash Car Company, which style was referred to in said plan."

The two cases were tried together in the Superior Court, before *Aldrich, J.*, who allowed a bill of exceptions, which, so far as material, is as follows.

Osgood contended that McGann did not finish the cars in a workmanlike manner and build the wheels of the cars of the "best quality of Babbitt's metal," as required by the agreement, and declined to accept more than four hundred and nine cars, and these he sold for a nominal sum. McGann contended that he made and delivered the four hundred and nine cars according to the contract, and was ready to furnish the balance called for by it, but Osgood refused to receive and pay for the same.

Evidence was introduced tending to prove that the wheels put by McGann on the cars were not made of the best Babbitt's metal. There was also much evidence on the part of experts, which was conflicting, as to what was the "best quality of Babbitt's metal," and as to the proportions of the different metals used in its production.

Osgood testified that he had had no experience whatever in regard to Babbitt's metal, except that he had heard of it and knew that it was a very hard metal.

McGann testified that he went with Osgood, on June 24, 1883, to Morey and Smith's; that Osgood "wanted to take me there to introduce me to the concern who had made wheels for him, and who, he thought, were the proper persons"; that he introduced him to Smith, saying, "You know just what I want, Mr. Smith, and I want you to go to work and make wheels for this man"; that Smith and Osgood came to his place some time in September, after the contract was signed, and Osgood said to Smith, "Mr. Smith, are these wheels made of the best Babbitt metal?" to which Smith replied, "They are of the very best"; and that a car then in court and before the jury was in every respect identical with the car given by him to Osgood as a model car, save that the original car did not have a belting on top or chasing on the wheels. The judge called attention to the indorsement on the agreement, and asked the witness if he was on July 30 making cars for the Osgood Cash Car Company, and if the car before the jury was the car referred to in the agreement, to which he replied, "No, sir, I had made them but one car. . . . That is the car, the simple difference is in the belting." The

judge then added, "I understand that this is the car which he had already made, which is referred to in this indorsement, and which was adopted as the model car, according to which this contract was to be fulfilled." And to this statement there was no dissent expressed by either party.

One Hafey testified, that some time in July or August he heard Osgood, in McGann's presence, while Osgood was holding a cash car wheel in his hand, ask Smith, "Is this the best Babbitt metal?" and that Smith said, "Yes, it is."

The judge instructed the jury as to the material of which these cars were made, as follows: "Undoubtedly, in the proper interpretation of that contract, they were to be made of the best quality of Babbitt's metal. Now, how are you to determine that question, What is the best quality of Babbitt's metal? We have several formulas here. . . . How are you to determine what is the best Babbitt's metal as a practical question in this case? Well, gentlemen, some rule must be given, and I think that where there is a difference, such a difference, in the opinion or judgment or experience of men dealing with this article, Babbitt's metal, — no two of them agreeing, — that if when parties are making a contract, that when these parties came to make their contract, if they selected a quality of Babbitt's metal which they called the best, and these wheels were to be made of that metal, then, if they were made of that metal, that is a fulfilment of the contract. You will understand, gentlemen, if there is a diversity of judgment as to what makes the best Babbitt's metal, and no two witnesses agreeing, that if, when parties come to make a contract, one part of which, to wit, the wheels in this case, are to be made of Babbitt's metal, and the best quality of Babbitt's metal, if the contracting parties select that particular quality of it which they have then and there before them as the best quality, then, although it should turn out afterwards that, in the judgment of other witnesses, it is not the best quality, that does determine it so far as this contract is concerned, and I therefore instruct you for the purposes of this case, and it seems to me it is the only interpretation that can be given to this contract as it is written, that if there was a model car, including the wheels, which wheels were made of a metal subject to the inspection of the contracting parties, and the agreement was that these thou-

sand cars were to be made in conformity with that style and form and kind of car, including wheels, and every other part of it, and the parties adopted that particular style of Babbitt's metal as the quality of metal which these cars were to be made of, and treated that as the best quality Babbitt's metal, then, if Mr. McGann made the wheels like that one, he fulfilled his contract, although it should turn out that it was not, in the judgment of other witnesses, the best quality of Babbitt's metal, because they adopted that. . . . I say, supposing they did not adopt that as the best quality of Babbitt's metal, and he undertook independently to say they shall be, then he must see to it that the wheels that he put upon these cars were of the best quality of Babbitt's metal."

The jury returned a verdict for McGann; and Osgood alleged exceptions.

D. F. Crane, for Osgood.

C. M. Barnes, for McGann.

W. ALLEN, J. The agreement under seal provided that the car wheels should be made of the best quality of Babbitt's metal. There was conflicting evidence as to the meaning of the words "best quality of Babbitt's metal," as used in the contract, and the court, in effect, instructed the jury that it was competent for them to find that the parties adopted the metal of which the wheels of a certain car, which was before them for some purpose, were composed, as the best Babbitt's metal intended by the contract.

It is objected that, if there was such ambiguity disclosed in the language as rendered it competent to show that the parties agreed upon and adopted a specimen of metal to be taken as the best Babbitt's metal of the contract, yet there was no evidence that the parties did so, and therefore instructions that the jury might find that they did were erroneous.

The contract itself provided that "said cars to be made according to the style shown in a sketch or plan marked A, hereto annexed." Then follow minute specifications as to the material and construction of the car and its different parts, that relating to the wheels being that "the wheels are to be three inches in diameter, and made of best quality of Babbitt's metal and nickel-plated." The contract was dated July 10. Under date of July 30, this indorsement was made upon it:

"The plan described in the within contract, marked A, is omitted by consent of both parties, and for further description, for the form and style referred to, is shown in the style and form of the cars now in process of manufacture by Thomas F. McGann for the Osgood Cash Car Company, which style was referred to in said plan."

There was evidence tending to prove that, when the indorsement was made, a car referred to in it was before the parties. The reference to the car in the indorsement is as a substitute for the plan mentioned in the contract, and is expressly limited to the purpose of showing the style and form of the car, and a construction of the writings that by them the parties adopted the material of the wheel of the car as the material of the wheel of the contract would be clearly erroneous.

The other evidence relating to the point is, in substance, as follows. Morey and Smith contracted to make the wheels for McGann. McGann testified that, before the contract was made, Osgood introduced him to Morey and Smith, saying that he wanted to introduce him "to the concern who had made wheels for him, and who, he thought, were the proper persons"; that Osgood said, on introducing him to Smith, "You know just what I want, Mr. Smith, and I want you to go to work and make wheels for this man," and told Smith that he wanted them made of the best Babbitt's metal, or something a little harder than the wheels of a car which was before them; and that Smith and Osgood came to his place some time in September, after the contract was signed, and Osgood said to Smith, "Mr. Smith, are these wheels made of the best Babbitt metal?" to which Smith replied, "They are of the very best." It may be assumed that the wheels referred to were those of the car mentioned in the indorsement. Another witness testified that some time in July or August he heard Osgood, in McGann's presence, while Osgood was holding a cash car wheel in his hand, ask Smith, "Is this the best Babbitt metal?" and that Smith said, "Yes, it is."

This we understand to be all the evidence which it can be claimed tends to prove that the parties agreed that the "best quality of Babbitt's metal" mentioned in the contract should be taken to be the metal of which the wheels of the cars referred to in the indorsement were made, or adopted the metal of those

wheels as the metal of the contract. Taking this evidence, without regarding the evidence tending to contradict and control it, we think it did not raise or present the particular issue which was submitted upon it to the jury, and that the instructions to the jury were erroneous. *Exceptions sustained.*

LEANDER STONE vs. WILLIAM L. WAINWRIGHT & others.

Suffolk. March 16, 1888. — June 10, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Judgment in another State — Joint Contractor — Service of Process.

The judgment of a court of another State on a note against five makers jointly, one of whom lives in this Commonwealth and was never served with process there, is no bar to an action against him here on the note, although the judgment was in accordance with the law of that State.

HOLMES, J. This is an action of contract upon four promissory notes, brought by the payee against the five makers, who were copartners under the name of the Olympian Roller Skating Club. Two only of the defendants, Wainwright and Noble, were within the jurisdiction, or were served. These defendants set up a judgment recovered in New York as a bar. The New York judgment was rendered against all five; but the defendant Wainwright lived in Massachusetts, and was never served with process in New York. The New York summons and complaint were served upon him in Boston, in pursuance of an order of one of the justices of the New York court. In the present action the court found for the defendant Noble, but declined to rule that Wainwright was entitled to judgment, or that his liability was to be determined by the common law, and found against him. The case comes up on Wainwright's exceptions to the refusal to rule as stated.

In the absence of any evidence of the New York statutes, the New York judgment would be no bar to the present suit against Wainwright, because it would be void as against him for want

of jurisdiction; and being a joint judgment, it would be void altogether. *Knapp v. Abell*, 10 Allen, 485, 490. *Wright v. Andrews*, 130 Mass. 149, 151.

In our opinion the sections of the New York code put in evidence do not change the result. §§ 438-445, 1932-1938, 1946. By § 1932, the plaintiff, in an action against defendants jointly indebted upon a contract, may proceed against the defendants served with process, and, if he recovers, may take judgment against all the defendants. By § 1933, when such a judgment is taken against a defendant upon whom the summons was served without the State, pursuant to an order for that purpose, it has the effect specified in § 445, by which the defendant, upon good cause shown, and upon just terms, may be allowed to defend after final judgment, within certain times limited. And § 1933 further provides that, as against such defendant who is allowed to defend after judgment, the judgment is evidence only of the extent of the plaintiff's demand, after the liability of that defendant has been established by other evidence.

We see no reason to doubt, and we assume, that this case was one in which §§ 438 *et seq.* purported to authorize service without the State by order, that § 1932 purported to authorize the judgment against all the defendants, including Wainwright, and that the judgment had the effect above stated, so far as the statute could give it that effect.

At the same time, it is very plain that the judgment against Wainwright would not be recognized outside of New York if a suit were brought upon it, and it can have no greater effect as a bar than it would have as a cause of action. It would be a singular conclusion, that, because a record established Wainwright's liability in New York, he was not liable anywhere else in any form of action.

If all the defendants in an ordinary action at law live out of the State, and none of them are served with process or voluntarily appear, it is settled that a judgment against them is only valid so far as to warrant the application of property attached to its satisfaction, and will have no general operation *in personam*, even in the State where it is rendered. Statutes cannot confer jurisdiction over persons not subject to the legislative power. *Eliot v. McCormick*, 144 Mass. 10. *Freeman v. Alderson*, 119

U. S. 185. *Grover & Baker Sewing Machine Co. v. Radcliffe*, 66 Md. 511.

It is only by very subtle reasoning that the fact that the New York court had power to enter judgment against the other defendants could be held to enlarge their power against Wainwright, even so as to give the judgment against him a local validity. Clearly the judgment can have no force against him outside of the State. The result is the same, whether the judgment be pronounced void as against Wainwright, and therefore void as against all, notwithstanding the statute, or whether, since it is in statutory form, it be held valid as against those with whom the statute had power to deal. In either view it cannot bar a suit against Wainwright on the notes.

For if the judgment be held valid against the defendants who were within the jurisdiction, the judgment is in effect (at least outside the State of New York) a judgment against those defendants only, although in form it also embraces Wainwright. By immemorial practice, founded on necessity, and embodied in a declaratory statute in this Commonwealth, if an action of contract is brought against several defendants, some of whom cannot be served, by reason of their absence from the State, the action may proceed against those who are duly served. But when a judgment is taken for this reason against less than the whole number of joint contractors, an action on the same contract may be maintained afterwards against any of those not served. Pub. Sts. c. 164, §§ 14, 15. Rev. Sts. c. 92, §§ 12, 13, Commissioners' note. *Tappan v. Bruen*, 5 Mass. 193, 196. *Olcott v. Little*, 9 N. H. 259. *Rand v. Nutter*, 56 Maine, 339.

It follows from the same necessity, and has been settled by repeated decisions, without the aid of statute, that similar judgments in other States can have no greater effect in barring an action here. *Shirley v. Shattuck*, 13 Met. 256, 260. *Odom v. Denny*, 16 Gray, 114. *Knapp v. Abell*, 10 Allen, 485, 490. *Dennett v. Chick*, 2 Greenl. 191.

Exceptions overruled.

W. C. Cogswell, for Wainwright.

F. A. P. Fiske, (*W. C. Wait* with him,) for the plaintiff.

WILLIAM H. MARTIN vs. HANNO W. GAGE.

Essex. April 3, 1888. — June 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Administrator — Ancillary Administration — Jurisdiction — Appeal —
“ Person aggrieved ” — Assets — Sale.*

An administrator, appointed in another State, on the estate of a person there resident and deceased, may appeal from a decree of the Probate Court appointing an administrator here.

A sale by such foreign administrator, without taking out ancillary administration, of a yacht, the only property belonging to the estate here, which he takes possession of here, but which, when the intestate died, was in the other State, is valid, and leaves no assets to be administered upon in this Commonwealth.

APPEAL, by Hanno W. Gage, from a decree of the Probate Court, made on April 19, 1886, appointing William H. Martin as administrator of the estate of his wife, Isabella H. Martin. The appellant filed, among other reasons of appeal, the following: “That there were no goods, effects, estate, or debts to or by the said Isabella H. Martin, in this Commonwealth, at the time of the appointment of the said William H. Martin as administrator of said estate, and that the Probate Court had no jurisdiction over the subject matter at the time of the said appointment.”

Hearing before *Gardner, J.*, who overruled a motion to dismiss the appeal because the appellant, as appeared by his reasons of appeal, was not aggrieved by the decree of the Probate Court, and found the following facts.

Isabella H. Martin, who resided at Portland in the State of Maine, died there on July 18, 1885. Gage was duly appointed administrator of her estate by the courts of that State, on September 15, 1885, upon the petition of her husband. The intestate owned a yacht, which her husband during the summer of 1885 brought from Portland to Salem, and left in charge of a wharfinger for the winter. Prior to April 19, 1886, Gage, having been duly licensed to sell the personal estate, took possession of the yacht at Salem, and made an agreement to sell her, and delivered her to the purchaser, subsequently, upon payment of the price, giving a bill of sale to him. Martin, after his

appointment as administrator, attempted to sell the yacht to another person.

The judge refused to rule, as requested by the appellee, that the appellant was not a person aggrieved within the statute, and that this appeal would not lie, and ruled that, at the time of the appointment of Martin as administrator, there were no goods or estate of the intestate in this Commonwealth to be administered upon, and that the Probate Court had no jurisdiction in the premises; and ordered the decree of the Probate Court to be reversed. The appellee alleged exceptions.

V. J. Loring, (C. F. Loring with him,) for the appellee.

J. G. Abbott, (C. G. Saunders with him,) for the appellant.

W. ALLEN, J. The appellant is the administrator, appointed by the courts of the State of Maine, of the estate of Isabella H. Martin, who was a resident of that State, and who died there. He appeals from the decree of the Probate Court of Essex County in this Commonwealth, appointing the appellee administrator of the estate of Mrs. Martin. The principal administration is in the State of Maine, and administration granted in this Commonwealth must be ancillary to that. The domiciliary administrator, representing the general estate, has an interest in ancillary administrations, and can appeal from the appointment of an administrator in this Commonwealth. *Smith v. Sherman*, 4 Cush. 408. The appellee's motion that the appeal should be dismissed, for the reason that the appellant was not a party aggrieved by the decree, was properly overruled.

The only reason of appeal which there is occasion to consider is, that there were no assets of the intestate in this Commonwealth. The intestate owned a yacht which was in the State of Maine at the time of her decease, but was brought into this Commonwealth by the appellee before the appointment of the appellant as administrator. After the appointment of the appellant, he came into this Commonwealth, took possession of the yacht, and sold it, before the appellee was appointed administrator by the decree which is appealed from. Except the yacht, there never were any assets of the estate in this Commonwealth. We think that there was no estate of the decedent to be administered upon in this Commonwealth. The yacht was in Maine at the time of her decease, and the appointment of the

appellant related back and gave him a title and right of possession to it from that time, which will be recognized and enforced in other jurisdictions. *Bullock v. Rogers*, 16 Vt. 294. *Valentine v. Jackson*, 9 Wend. 302. *Holcomb v. Phelps*, 16 Conn. 127.

Even if the property had never been in the State of Maine, it seems that the taking possession and sale of it here, by the appellant, would have been valid, there being no creditors of the intestate here. *Hutchins v. State Bank*, 12 Met. 421. *Luce v. Manchester & Lawrence Railroad*, 63 N. H. 588. *Petersen v. Chemical Bank*, 32 N. Y. 1. *Trecothick v. Austin*, 4 Mason, 16. *Doolittle v. Lewis*, 7 Johns. Ch. 45.

It is contended in behalf of the appellee, that where chattels of a person are at his decease in the hands of his bailee, in another State from that of his domicile, the administrator of the place of domicile cannot sell them in the other place without taking possession, and cannot take possession without the consent of the bailee. We need not consider this proposition, because it does not apply to the case at bar. It appears that the property was in the place of the intestate's domicile at the time of her decease, and it does not appear that it was in the hands of her bailee.

Exceptions overruled.

RUSSIA CEMENT COMPANY vs. WILLIAM N. LEPAGE.

Essex. April 8, 4, 1888. — June 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Trade-mark — Use of Name — Contract — Estoppel — Injunction.

A manufacturing firm, which called its product "LePage's Liquid Glue" after the name of a partner, with his consent, sold the "right to use the trade-marks belonging to or in use by said copartnership" to a corporation, of which that partner became an officer, and which continued to make the glue under the same name, registration thereof being sought by him at the Patent Office. Afterwards he left the corporation, and began to do business as "LePage's Liquid Glue Company," and to make and sell "LePage's Improved Liquid Glue." Held, on a bill in equity to restrain him from using those names, that he had parted with the right to use his own name as a trade-mark, and that the use of the word "Improved" did not justify such use; and that an injunction should issue.

BILL IN EQUITY, filed September 16, 1886, to enjoin the defendant from using as trade-marks the words "LePage's Liquid Glue" and "LePage's Improved Liquid Glue," and from doing business under the style of "LePage's Liquid Glue Co."

At the hearing before *Gardner, J.*, there was evidence tending to prove the following facts.

About January 1, 1880, the defendant and one Brooks, co-partners, doing business under the name of the Russia Cement Company, began to manufacture and sell glues. They made a heavy glue, designated "Russia Cement," and a class of light glues; and in that month, in discussing the question by what name the light glues should be called, Brooks suggested that they adopt the name "LePage's Liquid Glues," on the ground that it was "a peculiar name; when it appears in print it will strike the eye, and fix itself as something singular, unique; it has a French sound, foreign, and I think it will be a taking name; it is worth a great deal more than any ordinary name." The name "LePage's" accordingly was decided upon, with the consent of LePage, as the name by which the light glues should be known, that word being always employed, but a special word being put in before the word "glue," such as "straw," "carriage," etc., indicating the particular use for which each glue was designed. The labels upon the cans and bottles in which the light glues were put up, though differing widely in other particulars, agreed in having the word "LePage's" prominently printed as a prefix to the words describing the kind of glue, as did their public advertisements of their lighter glues.

On February 4, 1882, the defendant and Brooks, as such co-partners, executed and delivered to the plaintiff corporation, which had been organized by them, a bill of sale of all the personal property belonging to the firm, "together with all the cash and book accounts belonging to the said firm, the good-will of the business, and the right to use the trade-marks belonging to or in use by the said copartnership." Thereupon the plaintiff engaged in, and continued to carry on, the business of making and selling such glues as the defendant and Brooks had made and sold as copartners, using similar labels, selling the light glues under the trade-mark or trade name of "LePage's," and advertising the goods at an expense of over \$30,000.

The defendant was treasurer of the plaintiff corporation from its organization until some time in 1884, and was afterwards a director, until he left it in February, 1886. In November, 1883, the plaintiff wrote to its attorney at Washington, with the knowledge and approval of the defendant, who was at that time the treasurer of the corporation, a letter containing an inquiry as to the steps necessary to secure, by registration at the United States Patent Office, the right to use the words "Russia Cement" and "LePage's." The defendant withdrew from the plaintiff corporation in February, 1886, and shortly after engaged in the manufacture and sale of liquid glue at Gloucester, Massachusetts, where the business of the plaintiff had always been carried on. The defendant adopted the name and address of "LePage's Liquid Glue and Cement Co., Gloucester, Mass.," and advertised his business under this name, called his liquid glue "LePage's Improved Liquid Glue," and described its manufacture as carried on "under the management of William N. LePage, the original inventor and manufacturer of LePage's Liquid Glue."

The judge refused the injunction, and dismissed the bill, and reported the case for the consideration of the full court.

E. R. Hoar & C. Browne, for the plaintiff.

W. Gaston & F. Forbes, (*F. L. Washburn* with them,) for the defendant.

DEVENS, J. The plaintiff and the defendant are manufacturers of liquid glue, and the defendant, whose name is LePage, uses the same name as that used by the plaintiff to describe his glue, and by which to advertise it, except that he introduces therein the word "improved." The introduction of this word into the name of the article manufactured by him does not justify its use, if in other respects the plaintiff has just ground to object to it. *Sebastian on Trade-Marks*, 52. *Frazer v. Frazer Lubricator Co.* 18 Bradw. (Ill.) 450, 462. *Gillis v. Hall*, 2 Brewst. 342.

A person cannot make a trade-mark of his own name, and thus debar another having the same name from using it in his business, if he does so honestly, and without any intention to appropriate wrongfully the good-will of a business already established by others of the name. Every one has the absolute

right to use his own name honestly in his own business for the purpose of advertising it, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right to it are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. *Holloway v. Holloway*, 13 Beav. 209. *Meneely v. Meneely*, 62 N. Y. 427. *Gilman v. Hunnewell*, 122 Mass. 139. *Rogers v. Rogers*, 53 Conn. 121.

While this is the general rule, it is also true that one may so sell or part with the right to use his own name as a description or designation of a manufactured article as to deprive himself of the right to use it as such, and confer this right upon another. A name used as an adjective of description is not necessarily understood by the public as any assertion that the person whose name is used is the maker of the article. One who has carried on a business under a trade name, and sold a particular article in such a manner, by the use of his name as a trade-mark or a trade name, as to cause the business or the article to become known or established in favor under such name, may sell or assign such trade name or trade-mark when he sells the business or manufacture, and by such sale or assignment conclude himself from the further use of it in a similar way. *Horton Manuf. Co. v. Horton Manuf. Co.* 18 Fed. Rep. 816. *McLean v. Fleming*, 96 U. S. 245. *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321. *Probasco v. Bouyon*, 1 Mo. App. 241. *Oakes v. Tonsmierre*, 4 Woods, 547, 555. *Celluloid Manuf. Co. v. Cellonite Manuf. Co.* 32 Fed. Rep. 94. *Ainsworth v. Walmsley*, L. R. 1 Eq. 518, 524. *Shaver v. Shaver*, 54 Iowa, 208. *Frazer v. Frazer Lubricator Co.*, *ubi supra*.

A person may be enjoined, therefore, from using his own name as a description of an article of his own manufacture, and from selling the article under that particular name, when he has parted with the right thus to apply it. *Gillis v. Hall*, 2 Brewst. 342. *Kidd v. Johnson*, 100 U. S. 617, 619. It is not upon the

ground of the invasion of the trade name adopted by another, but by reason of the contract he has made, that he is deprived of the right himself to use his name as all others of the same name may use theirs.

The recent case of *Hoxie v. Chaney*, 143 Mass. 592, which has been decided since the decree originally made in the case at bar was rendered, is quite conclusive in regard to it. It was there held that "A. N. Hoxie's Mineral Soap" and "A. N. Hoxie's Pumice Soap" were trade-marks, and assignable as such, and that they did not necessarily mean that the soaps were made by A. N. Hoxie. In that case, one who had adopted these trade-marks, or, more properly, trade names, for his manufacture, entered into a partnership with another, under articles by which he contributed the good-will of the business he was carrying on, with the tools, implements, and fixtures, and on the dissolution of this partnership conveyed to his partner "all my right, title, and interest in and to all and singular the partnership property belonging to the firm, meaning hereby to sell and convey all my interest in the entire assets of said firm"; and it was further held that these trade names became, by the articles of copartnership, a part of the property of the firm, and that the right to use them as such passed by the bill of sale, and that the partner so conveying had parted with his own right so to use them.

Upon the evidence in the case at bar, it appears that "LePage's Liquid Glue" was the name adopted by Brooks and LePage for the light glues manufactured by them, a special word, such as "straw," "carriage," etc., indicating for what especial use the particular light glue was designed, being inserted before the word "glue"; that they manufactured glues under this name, and, at a subsequent period, in 1882, formed the plaintiff corporation, to which they sold their business, and which continued the manufacture of these glues under the same name. The defendant was a member of the corporation, and a director thereof, until February, 1886. He then left it, and shortly after engaged in the manufacture and sale of glue at Gloucester, where the plaintiff's business has always been carried on, using the name "LePage's Improved Liquid Glue" to advertise the article produced by him.

When Brooks and LePage sold their business to the plaintiff, they in express terms sold "the right to use the trade-marks belonging to or in use by said copartnership." When LePage (with Brooks) sold to the corporation, and when he left the corporation, it must be held that the name "LePage's Liquid Glue" was a trade name or trade-mark, and it is not important which term is used, indicating the liquid glue which the plaintiff was manufacturing. The right to use it as such was necessarily an exclusive use, as it was intended thus to distinguish the plaintiff's goods from those of others. As a trade-mark belonging to the corporation, the defendant while an officer thereof had himself sought to obtain registration for it at the United States Patent Office.

We are of opinion, therefore, that the defendant should be enjoined from using the words "LePage's Improved Liquid Glue," or "LePage's Liquid Glue," to describe the article manufactured by him, and from describing the company under whose name he conducts his business as "LePage's Liquid Glue Company," whether with or without any addition thereto.

While the plaintiff has not sought to prevent the defendant from manufacturing glue, we add, in order to avoid misunderstanding, that while the defendant cannot use the words adopted as a trade name for the article manufactured by him, we do not decide that he may not use the words "Liquid Glue," or other appropriate words, to describe his product, or to state in that connection that he is himself the manufacturer of it.

Decree for the plaintiff.

PATRICK P. SHERRY & others vs. CHARLES E. PERKINS
& another.

Essex. April 4, 1888. — June 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Equity — Injunction — Intimidation — Nuisance — Libel.

Banners displayed in front of a person's premises with inscriptions calculated to injure his business and to deter workmen from entering into or continuing in his employment constitute a nuisance which equity will restrain by injunction.

BILL IN EQUITY, filed April 20, 1887, alleging that the first-named plaintiff was engaged in the business of manufacturing boots and shoes in Lynn, and that he had admitted the other plaintiffs, who were in his employment as operatives, to share in the profits of the business; that there was a voluntary association in Lynn called the Lasters' Protective Union, composed of persons engaged in lasting boots and shoes, of which the first-named defendant was the president, and the other defendant, Charles H. Leach, was the secretary; that on January 5, 1887, Leach, acting for himself and Perkins, called upon Sherry to inquire as to the wages of his lasters, and was told that such wages were to be fixed by the lasters; that on January 8, 1887, certain lasters left the plaintiffs' employment, giving as a reason therefor that they did not dare to work for them further on account of the defendants; that, in order to intimidate others from taking their places and to prevent such lasters from re-engaging in their employment, the defendants, on January 8, 1887, with the assent of the association and out of its moneys, caused to be carried in front of Sherry's factory, by a boy hired for that purpose, a banner bearing the following inscription: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U."

The bill further alleged, that, because of such banners, crowds of people gathered in front of the factory when the lasters left their work; that the lasters were injured and threatened with bodily harm if they continued in the plaintiffs' employment; that various lasters, whose names were given, were subsequently called upon by the defendants, and so intimidated and injured

that one of them was confined to his house and another left the plaintiffs' employment; that the banner and the acts of the defendants were part of a scheme to prevent persons from entering the plaintiffs' employment, and that the banner was carried in front of the factory until March 22, 1887, when the defendants, with a like purpose and at a time when there was no strike in the factory or trouble with the operatives, caused another banner to be carried in like manner before the factory, with the following inscription: "Lasters on a strike and lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per' order L. P. U."

The bill also alleged that Sherry had remonstrated with the defendants without effect; that the business carried on by the plaintiffs was a large one, and that the good-will was of considerable value, both of which, if the defendants were permitted to continue, would be seriously injured and destroyed.

The prayer of the bill was, that the defendants might be restrained from making such banners, and from causing them to be similarly carried, and for further relief.

Hearing before *C. Allen, J.*, who found as facts, that members of the Lasters' Protective Union entered into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs as lasters from continuing in such employment, and in like manner to prevent other persons from entering into such employment as lasters; that the defendants participated in this scheme; that the use of the banners was a part of the scheme; that the first banner was carried from January 8, 1887, to March 22, 1887, and the second banner from March 22, 1887, to the time of the hearing; and that the plaintiffs have been and are injured in their business and property thereby; and the judge reported the case for the consideration of the full court.

J. R. Baldwin, for the defendants.

R. Lund & F. Hurlburt, (*T. M. Osborne* with them,) for the plaintiffs.

W. ALLEN, J. The case finds that the defendants entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs from continuing in such employment, and to prevent others from entering into such employment; that the banners with their inscriptions were

used by the defendants as part of the scheme; and that the plaintiffs were thereby injured in their business and property.

The act of displaying banners with devices, as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, was injurious to the plaintiffs, and illegal at common law and by statute. Pub. Sts. c. 74, § 2. *Walker v. Cronin*, 107 Mass. 555. We think that the plaintiffs are not restricted to their remedy by an action at law, but are entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiffs' bill, and continued to be used at the time of the hearing. The injury was to the plaintiffs' business, and adequate remedy could not be given by damages in a suit at law.

The wrong is not, as argued by the defendants' counsel, a libel upon the plaintiffs' business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiffs' business. The scheme in pursuance of which the banners were displayed and maintained was to injure the plaintiffs' business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiffs. The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises. Maintaining it was a continuous unlawful act, injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against. *Gilbert v. Mickle*, 4 Sandf. Ch. 357. *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

Boston Diatite Co. v. Florence Manuf. Co. 114 Mass. 69, was a case of defamation only. Some of the language in *Springhead Spinning Co. v. Riley* has been criticised, but the decision has not been overruled. See *Boston Diatite Co. v. Florence Manuf. Co.*, *ubi supra*; *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142; *Saxby v. Easterbrook*, 8 C. P. D. 339; *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 768; *Thomas v. Williams*, 14 Ch. D. 864; *Day v. Brownrigg*, 10 Ch. D. 294; *Gaskin v. Balls*, 13 Ch. D. 324; *Hill v. Davies*, 21 Ch. D. 798; *Hermann Loog v. Bean*, 26 Ch. D. 306.

Decree for the plaintiffs.

THOMAS BLANCHARD vs. WILLIAM R. COOKE & others.

Worcester. April 6, 1888. — June 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Equity Practice — Bill — Issues for Jury — Waiver — Amendment —
Contract — Breach — Evidence.*

A defendant in a suit in equity filed an answer in the Superior Court in February, 1886, and, after a hearing, a final decree was entered in June, 1886, which, on appeal, was reversed in March, 1887. The case was again heard in May, 1887, when he, after the juries were dismissed for the term, for the first time filed a motion for issues to a jury, having had ample time to do so before their dismissal. *Held*, that he had waived his right, if he had any, to a trial by jury, and that his application was too late.

The owner of a stock of goods in A. made a conditional sale thereof, upon an agreement that the legal title should remain in him, but should vest in the buyer in proportion to the amounts paid by him from time to time on account of the purchase money, the buyer also agreeing to apply on account thereof the proceeds of the sale of a stock of goods in B., as soon as received. *Held*, that a failure by the buyer to pay over the proceeds of the B. goods would authorize the seller to enter and take possession of the A. goods remaining.

After such entry, the seller filed a bill in equity, alleging that the buyer had failed and neglected to pay over the balance of the proceeds of sales, though often requested to do so, and that, in violation of his agreement, the buyer had taken such proceeds and appropriated them to his own use. At the hearing the seller contended that the entire proceeds of the B. goods were to be paid over to him, and evidence was admitted of the buyer's misappropriation thereof, no objection being made that the averments of the bill were not broad enough to cover it. *Held*, that it was too late, at an argument before the full court, on appeal, to object that such evidence was improperly admitted.

BILL IN EQUITY, filed in the Superior Court on December 4, 1884, brought originally against William R. Cooke alone, and alleging that on July 12, 1883, the plaintiff was the owner and in possession of a stock of goods in Southbridge; and that on that day Cooke executed a contract, under seal, containing the following provisions.

“That said Blanchard hereby agrees to sell, and said Cooke agrees to buy, all the stock of goods, fixtures, and merchandise, and property owned by said Blanchard now contained in the store of the Edwards estate, at said Southbridge, as itemized, invoiced, and entered upon a certain stock-book marked ‘T. Blanchard’s stock-book,’ for the sum of fourteen thousand two

hundred and fourteen and $\frac{24}{100}$ dollars, said agreement to sell and purchase being made on the following terms and conditions, to wit:

“Said Blanchard promises and agrees to give, and hereby does give, to said Cooke possession of said goods, merchandise, fixtures, and property, with full power and authority to manage, deal with, and sell the same, in the regular course of business as a retail dealer in dry goods, and to take and receive the proceeds from such sales, and to apply the same as shall hereinafter be provided, upon the following express conditions, namely:

“That for the security of said Blanchard the legal title in said goods shall be and remain in said Blanchard until said sum of \$14,214.94, with interest at the rate of seven per cent per annum, shall have been fully paid, it being agreed, however, that said title may vest in said Cooke in the proportion to the amount which at any time he shall have paid on account of said \$14,214.94, and interest, said Cooke hereby covenanting and agreeing that said Blanchard shall be the legal owner of a fractional part of the stock of goods in said store, whether it be these goods or goods subsequently purchased by said Cooke, which fractional part shall at all times bear the same proportion to the balance of \$14,214.94, and interest, then unpaid, and due from said Cooke, that the whole amount of goods now bears to said sum of \$14,214.94.

“That said Cooke shall pay, out of the proceeds of all sales made by him, the rent of said store, taxes, reasonable clerk hire, and insurance, and shall have the right to use the proceeds of sales of these goods to purchase new goods in the regular course of business, and also have the right to take from said proceeds the sum of one hundred and twenty-five dollars each month or fractional part thereof for his own use and living expenses.

“Said Cooke shall take an account of stock some time during the months of February and August each year, and, after the payment of the expenses before named for said six months prior to taking said account of stock as aforesaid, pay to said Blanchard the balance of said entire proceeds of sales for each six months, until the whole sum of \$14,214.94, with interest at the rate aforesaid, shall have been fully paid, it being agreed said Cooke shall have the right to pay to said Blanchard, at any time,

any other and further sums on account of said \$14,214.94 for all of which payments said Blanchard is to give a receipt and indorse the same on a duplicate copy of this contract; provided, however, and it is mutually agreed, said \$14,214.94, with interest at the rate aforesaid, shall be fully and entirely paid within four years from the date herein before first written.

“ That said Cooke shall keep regular books of account of all purchases and sales, and all expenses and receipts, which at all reasonable times shall be open to the inspection of said Blanchard, his attorney or representatives; and that said Cooke shall make or cause to be made a trial balance of each month's business, and give the same to said Blanchard at the end of each month.

“ That said Cooke shall keep said stock of goods and fixtures, and all other goods and fixtures that he may hereafter purchase, insured in some good insurance company or companies for the full value thereof, which insurance shall be payable to said Blanchard, and in case of loss by fire it is agreed said Blanchard is authorized and empowered, and shall have the right, to sue and collect the whole amount of insurance from said companies at the expense of said Cooke, and, after collecting the same therefrom, first pay to himself the amount at that time due to himself from said Cooke, and then pay the balance to said Cooke; it being agreed, however, if said Blanchard shall be unable to collect the full value of the goods burned or injured from said companies, that said Blanchard shall bear that proportion of that loss which the amount due to him from said Cooke bears to said sum of \$14,214.94, with interest at the rate aforesaid, at the time of said loss. But in case of any loss, injury, or casualty other than by failure to collect insurance for full value of goods in case of loss by fire, said Cooke shall bear the whole risk thereof, and said Cooke hereby assumes all such risks, and covenants and agrees in such case to pay to said Blanchard the full sum of \$14,214.94, with interest at the rate aforesaid; the same as if no such loss, injury, or casualty had occurred.

“ That said Blanchard agrees, when said \$14,214.94, with interest at the rate aforesaid, shall have been fully paid to him, to give to said Cooke a proper bill of sale of the goods herein

described, and to cancel and discharge this instrument, and to assign, transfer, and set over the lease of said store to said Cooke, which said Cooke hereby agrees to accept and assume, and pay the rent according to the terms therein expressed.

"It is further agreed, if said Cooke shall sell the stock of goods now owned by him and contained in the store in Burgess Block, Sandwich, Mass., that he shall pay the proceeds thereof, as soon as received by him, over to said Blanchard, on account of said sum of \$14,214.94; but if said Cooke shall not sell the same, said stock shall be removed to said Southbridge, and become a part of the stock referred to therein, and subject to the conditions and terms of this contract."

The bill further alleged, that on July 12, 1883, the defendant took possession of the property named in the contract, and thereafter did business in said store as a retail dealer in dry goods, collecting the proceeds of the sales of such goods, and paying out of such proceeds store rent, taxes, insurance, and clerk hire, and buying therewith goods to supply and maintain his stock and regular course of business, a part of the said goods originally purchased and goods since that date purchased in the regular course of business being now in the said store; that the defendant had failed and neglected to take accounts of stock, and pay over the balance of the proceeds of sales, and to make and give trial balances as provided in the contract, though often requested so to do by the plaintiff, but, in violation of his said agreement, had taken said proceeds, and appropriated a large sum thereof, namely, in all about \$3,500 of such proceeds belonging to the plaintiff, to his own use, contrary to the conditions of the said contract, and had refused to pay said sum.

The bill further alleged, that on November 28, 1885, default having been then made as aforesaid by said defendant in making said payment, and said breach of the conditions contained in said contract then continuing, the plaintiff took possession of the goods, fixtures, and merchandise in said store, and since said date had had entire possession and control thereof, and claimed the title thereto, and the right to hold the same as a pledge, and as security for his said debt, as provided in said contract, and in trust for the purpose of having the same applied to the payment of the said debt due him; that the sum now due to the plaintiff

upon said debt, and interest, was in all about \$11,500, and the value of the goods, fixtures, and merchandise was unknown, but was believed to be insufficient security for the payment of the sum due the plaintiff; that the plaintiff believes that the defendant is largely indebted to other creditors, and is unable to pay the same, and refuses to consent to any release of any right he has to said property; that if any fractional part of said goods has vested in the defendant at all, the same is of little value; and that the defendant has money in his hands, and accounts due him, from the sales of the goods, not returned or accounted for to the plaintiff, and belonging to him under the contract, to a larger amount in value than the value of the defendant's interest in the goods by means of any payments made by him therefor.

The prayer of the bill was for an account, for an injunction restraining the defendant from transferring his interest in the goods, and for a receiver to take possession of the goods, to sell them, and to hold the proceeds to be distributed according to the rights of the parties, and applied to the payment of the sums found due the plaintiff.

An injunction was issued as prayed for; and a receiver was appointed, who sold the goods, and paid the net proceeds into the hands of the clerk of the court.

On April 1, 1885, certain creditors of Cooke, who had been permitted to intervene, filed an answer, alleging, among other things, that since the filing of the bill Cooke had been adjudged an insolvent debtor; and on January 12, 1886, George P. Staples, who had been duly appointed assignee in insolvency of Cooke, was allowed to become a party, to file his answer, and to defend as assignee. On February 17, 1886, the assignee filed his answer, and, upon issue joined thereon, the case was heard and a final decree was entered on June 2, 1886. From this decree an appeal was taken to this court, which, on March 28, 1887, made a decision, reported 144 Mass. 207, reversing this decree.

The case was again heard on May 4, 1887, by *Aldrich, J.*, who, in a report of the evidence of the facts found by him, and the questions of law raised at the hearing, stated: "On the day the case was set down for hearing, the defendant Staples

asked that issues might be framed for the jury. The juries had at that time been dismissed for the term, and there had been ample time while the juries were still in court to make such demand or request for trial by jury; for this and other reasons, forming ground for the exercise of the discretionary power of the court, the request for a trial by jury was denied, and the defendant appealed."

The evidence admitted and reported tended to show that the plaintiff took possession of the store in Southbridge on the alleged ground that Cooke had broken his agreement in overdraw-ing his account, and in failing to hand over to the plaintiff the entire proceeds, as claimed by the plaintiff, of the sale of the stock of goods in the store at Sandwich, which took place subsequent to the date of the agreement, the circumstances attending the sale and the disposition of the proceeds thereof being fully gone into at the hearing, and recited in the evidence. The judge's report, as to this part of the case, contained the following:

"It has been from the beginning the main contention between the parties as to whether the defendant had or not paid to the plaintiff all that he was required to pay by the terms of the contract between the parties, or whether, in other words, the defendant had not overdrawn his account as charged in the plaintiff's original bill. The plaintiff has claimed, in all hearings before this court, that the entire sum for which the defendant sold his Sandwich stock of goods was by the terms of the written contract to be paid to the plaintiff upon the indebtedness of the defendant to him under said contract. . . .

"I find that on or before November 28, 1884, the said Cooke, in violation of the terms and conditions of the said contract on his part, had drawn out of the said business a sum of money amounting to between \$1,900 and \$2,100 in excess of what he had a right to draw out; and that there was therefore, on that day, a breach of the said contract by said Cooke, in consequence of which breach the said Blanchard had the right to take possession of the goods, merchandise, and property described in the plaintiff's bill, and that, by virtue of such right, he did on that day take possession thereof and retain such possession until the same was delivered by order of this court to the receiver ap-

pointed by the decree of the court, to be sold and the proceeds thereof be held subject to the order of the court.

"I find that it was agreed in said contract, that, 'If said Cooke shall sell the stock of goods now owned by him and contained in the store in Burgess Block, Sandwich, Mass., that he shall pay the proceeds thereof, as soon as received by him, over to said Blanchard on account of said sum of \$14,214.94; but if said Cooke shall not sell the same, said stock shall be removed to said Southbridge, and become a part of the stock referred to therein, and subject to the conditions and terms of this contract.'

"That said Cooke owned said stock, and soon after July 12, 1883, sold the same for \$3,600, and that said Cooke entered the same upon his accounts, and paid to the said Blanchard the sum of \$2,000 thereof, and only that sum, and used the balance thereof to pay his own private bills and bills due for the Sandwich stock, which were entered upon the books in the private or personal accounts of said Cooke.

"But I find that under said contracts said Blanchard was entitled to receive the whole of said sum of \$3,600 in payment of the indebtedness of said Cooke to him, on account of said contract; and that said Cooke had no right to use it for the payment of his own private bills, or the Sandwich debts, and should not be allowed the same or any part thereof upon the accounts between said Blanchard and Cooke, under said contract, except so far as he had paid of the said \$3,600 to said Blanchard.

"I find that if the said Sandwich stock was not included in the contract, and said Cooke was entitled to have the proceeds of said sale, and use the same to pay his own debts and Sandwich bills, then, in that case, Cooke had not overdrawn his accounts."

The judge, having found that Cooke had made certain payments to the plaintiff on account of his original indebtedness under the agreement, made a decree that payment should be made out of the fund in the hands of the clerk to the assignee, proportioned to such payments by Cooke, and that the balance should be paid to the plaintiff; and the assignee appealed to this court.

F. P. Goulding & A. J. Bartholomew, for the plaintiff.

J. J. Myers, for the assignee in insolvency.

C. ALLEN, J. The motion of the assignee, that issues be framed for a jury, was properly overruled, as coming too late. The assignee became a party to the cause and filed his answer in February, 1886, and proceeded to a hearing before the court, and a final decree was entered on June 2, 1886, from which an appeal was taken to this court, and the decree was reversed on March 23, 1887. The case was again set down for a hearing before the court, and on May 4, 1887, the day appointed for the hearing, he for the first time made application for issues for a jury. The presiding judge certifies that the juries had at that time been dismissed for the term, and that there had been ample time while the juries were still in court to make such request for a trial by jury. The proper time to present such request was before the hearing in 1886. By going into that hearing without presenting a request for a trial by jury, the assignee waived his right to such trial, if he had any such right before. And we think it a proper exercise of the discretionary power of the judge in respect to granting a jury trial, to refuse it at the time when the request was made. *Dole v. Wooldredge*, 142 Mass. 161, 179.

The assignee contends that the plaintiff did not in his bill allege any misappropriation by Cooke of the money received on the sale of the stock of goods at Sandwich, and therefore that evidence of such misappropriation was inadmissible. But we are of the opinion that it is too late to object to the admission of the evidence of such misappropriation, no special objection having been made at the hearing that the averments were not broad enough to cover it. The general charge in the bill was, that Cooke had failed and neglected to pay over the balance of the proceeds of sales, though often requested to do so by the plaintiff, but, in violation of his said agreement, had taken said proceeds and appropriated a large sum thereof, to wit, in all about \$3,500 of such proceeds belonging to the plaintiff, to his own use. If an objection had been made, that, taken literally, this only charged a misappropriation of the proceeds of sales in Southbridge, and did not include the proceeds of the sale in Sandwich, it would have been competent for the court to allow an amendment. But the hearing proceeded, without objection, on the assumption that no amendment was necessary, and a full investigation was had of the sale of the Sandwich goods, and the

disposition of the proceeds. The presiding judge certifies, what indeed is apparent from a perusal of the testimony, that it had been from the beginning the main contention between the parties, whether Cooke had or had not paid to the plaintiff all that he was required to pay by the terms of the contract, or whether, in other words, he had not overdrawn his account; and that the plaintiff has claimed, in all the hearings, that the entire sum for which Cooke sold his Sandwich stock of goods was, by the terms of the written contract, to be paid to the plaintiff upon the indebtedness of Cooke to him under said contract. If it is doubtful whether the bill contains a sufficiently explicit averment in respect to the Sandwich goods, certainly at this stage of the case, no objection having been raised at the hearing, it is too late to found any substantial argument upon this ground. The plaintiff might even now amend by making this averment more specific.

The assignee further contends, that a breach of the agreement by Cooke to pay over to the plaintiff the proceeds of the sale of the Sandwich stock of goods, as soon as received by him, would not authorize the plaintiff to enter and take possession of the goods in Southbridge. In respect to this, the agreement was as follows: "For the security of said Blanchard, the legal title in said goods shall be and remain in said Blanchard until said sum of \$14,214.94, with interest at the rate of seven per cent per annum, shall have been fully paid, it being agreed, however, that said title may vest in said Cooke in the proportion to the amount which at any time he shall have paid on account of said \$14,214.94, and interest, said Cooke hereby covenanting and agreeing said Blanchard shall be the legal owner of a fractional part of the stock of goods in said store, whether it be these goods or goods subsequently purchased by said Cooke, which fractional part shall at all times bear the same proportion," etc. This was followed by later provisions giving further effect to Blanchard's right in respect to said goods. The proceeds of the sale of the Sandwich goods were to be applied on account of said sum of \$14,214.94. It thus appears that Cooke distinctly agreed that Blanchard should be the legal owner of a fractional part of all the goods in Southbridge, whether then or thereafter purchased, until full payment of the \$14,214.94. The former

decision of this court was, that if there had been a substantial breach of the contract by Cooke, then the plaintiff had the right to take possession while the default continued. 144 Mass. 207, 228. The objection now taken appears to be fully covered by the former decision.

This disposes, we believe, of all the questions of law presented upon the present appeal.

Decree affirmed.

AARON H. SALTMARSH & others vs. LEONARD V. SPAULDING
& others.

Essex. May 5, 1888. — June 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Corporation — Directors — Mortgage — Power of Sale — Purchase by
Director — Writ of Entry.*

The Pub. Sta. c. 106, § 28, providing that a corporation shall not convey or mortgage its real estate, or give a lease thereof for more than a year, "unless authorized by a vote of the stockholders at a meeting called for the purpose," does not refer to foreign corporations.

A foreign corporation was authorized, by the laws of the State where it was organized, to make contracts and to purchase and convey necessary real estate, as well as to adopt by-laws to regulate the powers and duties of its officers. The directors, under a by-law authorizing them to manage and control its business, to hold meetings here, and to appoint necessary agents, ordered the president and treasurer, at a meeting held here, to mortgage the real estate of the corporation to secure its notes for borrowed money expended thereon; and these officers gave a power of sale mortgage in its name and under its seal. *Held*, that the directors acted within their powers, and that the mortgage was valid.

The mortgage was duly foreclosed for breach of condition, and the mortgaged premises were sold to the highest bidder, who was the only director not a surety on the mortgage note and who made the purchase in good faith, subsequently conveying undivided parts thereof to others, some of whom were directors. The premises were afterwards sold on an execution issued on a judgment subsequently obtained against the corporation. *Held*, that the purchase by such director, even if voidable, conveyed the legal title, and that the purchaser at the sale on execution could not maintain a writ of entry against him and his grantees.

WRIT OF ENTRY, dated August 5, 1886, to recover a parcel of land in Haverhill. Plea, *nul disseisin*.

The case was submitted to the Superior Court, and, after judgment for the tenants, to this court on appeal, on an agreed statement of facts, in substance as follows.

The American Glass Plate and Iron Pipe Company, a corporation organized on March 25, 1884, under the laws of the State of New Hampshire, became the owner of the demanded premises on December 24, 1884, and completed the erection of a factory thereon for the manufacture of glass ware. On March 31, 1884, the company adopted by-laws, the material part of which was as follows:

"Article 6. The directors shall manage and control the business of the corporation, and appoint all necessary agents and attorneys thereof."

The board of directors of the corporation, at a meeting held on December 29, 1884, in Haverhill, passed an order, without any action on the part of the stockholders, that the president and treasurer should mortgage the demanded premises to the City Five Cent Savings Bank of Haverhill, to secure two notes of the corporation given for \$9,000, borrowed therefrom. On the same day the president and treasurer executed a mortgage deed, which contained the usual power of sale, in the name of the corporation, and under its seal; and this was duly delivered and recorded. The \$9,000 thus borrowed was expended by the company upon the demanded premises. Prior to June 23, 1885, the mortgagee duly foreclosed the mortgage for breach of condition, and under the power of sale sold and conveyed the premises, on June 23, 1885, to the tenant Spaulding, who was a director of the corporation, and the only one not a surety on the notes of the corporation. Spaulding subsequently on the same day released to the other five tenants five undivided sixths of the premises; and since that time the tenants—all of whom save one were directors of the company, and that one was a stockholder—have held and claimed title to the premises. Under a petition to enforce a mechanic's lien, the premises were duly sold again, and conveyed to the tenants on November 16, 1885. The sales were made in good faith to the highest bidders; and the tenants, in making these purchases, acted in good faith, unless their relation to the company should imply the contrary.

On August 6, 1885, a special attachment of the corporation's real estate, which was then subject to the mechanic's lien, was duly made. In an action against the corporation, judgment was subsequently recovered against it, and "all right, title, and interest." of the company in the premises were duly sold and conveyed on execution, on May 29, 1886, to the demandants, the first-named demandant being also a director. Thereafter, and before bringing this writ of entry, the demandants duly tendered to the tenants the full amount paid by them, together with their expenses, taxes, and interest, but did not pay the same into court. The tenants declined to accept the tender, or to release the premises to the demandants. The General Statutes of New Hampshire of 1878, c. 135, § 2, and c. 147, § 4, cl. 3, and § 5, are to be treated as facts in this case, and may be referred to at the argument.*

If the demandants were entitled to the demanded premises or to any part thereof, judgment was to be entered for them for the whole or for such part, with nominal damages; otherwise judgment was to be entered for the tenants.

H. N. Merrill & J. O. Wardwell, (J. C. Caverly with them,) for the demandants.

E. T. Burley & C. U. Bell, for the tenants.

DEVENS, J. The demandants rely for their title upon a special attachment of the demanded premises by a creditor of the American Iron Glass Pipe and Plate Company, and a sale thereof on execution issuing upon the judgment subsequently obtained. The title of the tenants rests upon a mortgage law-

* Section 2 of chapter 135 is as follows :

"Any public or private corporation authorized to hold real estate may convey the same by an agent appointed by vote for that purpose."

Section 4, cl. 3, and section 5 of chapter 147 are as follows :

"Sect. 4. Any such corporation may adopt by-laws not repugnant to the laws of this State : . . . III. To regulate the number of officers, their powers and duties, the mode of choosing them, and their tenure of office ; and any others necessary and suitable to promote the objects of the corporation ; and alter and amend the same.

"Sect. 5. Any such corporation may make contracts necessary and proper for the transaction of their authorized business, and no other ; they shall not become sureties nor guarantors, nor be capable of binding themselves as such."

fully made, as it is contended, by the corporation to the City Savings Bank of Haverhill, and a foreclosure sale by authority of a power therein contained, both the mortgage and the foreclosure sale being made previously to the attachment relied on by the demandants. The tenants also rely upon a purchase made by them of the premises upon a sale under an order of court issued on a process to enforce a mechanic's lien. In the view we take of the case, it will not be necessary to consider the validity of the title thus acquired.

It is the contention of the demandants, that the mortgage made to the savings bank was without lawful authority, and void by virtue of the Pub. Sts. c. 106, § 23, which prescribes that no conveyance or mortgage of the real estate of a corporation, or "lease thereof for more than one year, shall be made, unless authorized by a vote of the stockholders at a meeting called for the purpose," no such vote having been passed authorizing the mortgage in question. An examination of the section shows that it refers only to corporations subject to the provisions of the chapter where it is found, and that it does not refer to foreign corporations.

While the general principle undoubtedly is, that the law of the place where real property is situate exclusively governs as to the title of parties therein, the disposition and mode of transfer thereof, and the solemnities attending such transfer, and while we do not doubt that it would be possible to provide by legislation that foreign corporations permitted to own real property situate in this State should only transfer the same by authority of the stockholders, no such provision has been made. *Attorney General v. Bay State Mining Co.* 99 Mass. 148. While they must comply in their forms of conveyance with those here required, they derive their authority to make them from the rules imposed upon them by the States where they are created.

The demandants further urge, that, even if the statute of Massachusetts does not apply to foreign corporations, there was no power vested in the board of directors by the laws of New Hampshire which authorized them to make a deed of real estate. The by-laws of the corporation vested the management and control of its business, and the authority to appoint all

necessary agents or attorneys therefor, in the board of directors. The mortgage deed was made in the name of the corporation and under its seal, by the president and treasurer of the corporation, by virtue of an express vote of the directors giving them authority.

The General Statutes of New Hampshire of 1878, c. 147, § 4, cl. 3, which are made a part of the case, empowered the corporation to adopt by-laws "to regulate the number of officers, their powers and duties, the mode of choosing them, and their tenure of office; and any others necessary and suitable to promote the objects of the corporation; and alter and amend the same." The corporation was one authorized to make contracts necessary and proper for its business, and to purchase, hold, and convey real and personal estate necessary for the transaction of its business. Gen. Sts. of N. H. of 1878, c. 147, §§ 5, 6.* The directors, by virtue of the powers implied from their position, had the general control and management of the business, which of necessity involved the raising of money to carry it on. It is found that the money raised by means of the mortgage was expended on the real estate mortgaged. In the absence of any prohibitory statute, a sufficient authority is shown on the part of the directors to mortgage the property, and in doing so they could adopt the form ordinarily in use where the real estate was situated. *Burrill v. Nahant Bank*, 2 Met. 163, 166. *Sargent v. Webster*, 13 Met. 497. *Hendee v. Pinkerton*, 14 Allen, 381, 387. *Despatch Line v. Bellamy Manuf. Co.* 12 N. H. 205.

The provision that a corporation authorized to hold real estate may convey the same by an agent duly appointed for that purpose (Gen. Sts. of N. H. of 1878, c. 135, § 2) does not exclude other modes of conveyance; as, for instance, in the name and under the seal of the corporation itself, and by the president and treasurer. Especially would this be so where the latter form is that used where the real estate is situated. *Morris v. Keil*, 20 Minn. 531. *Bason v. King's Mining Co.* 90 N. C. 417.

* Section 6 is as follows :

"Such corporations may purchase, hold, and convey real and personal estate necessary and proper for the due transaction of their authorized business, not exceeding the amount authorized by their charter or by statute, and no other."

It is said, however, that, even if the directors might make the mortgage, they had no power to delegate this authority, but must exercise it themselves. The directors delegated no discretionary power; they determined upon the mortgage, and made the president and treasurer simply the agents to execute formally that which they themselves had voted to do. In *Burrill v. Nahant Bank*, *ubi supra*, it was accordingly held that the directors of the bank not only might mortgage its real estate to secure a debt due from the bank, but might delegate such authority to a committee of their own number.

The demandants further contend, that a vote of the directors passed without the State to which their corporation owes its existence was void. The corporation was organized for the purpose of doing business without the limits of New Hampshire. Its works were within this State, and here its contracts were made and its business was conducted. Its by-laws, passed at a meeting of the corporation in New Hampshire, while they provide for the annual meeting of the corporation in that State, and for the choice of officers there, provide also for meetings of the directors for business in this State, for the control of the business and the appointment of the necessary agents here, and for the filling here by the directors temporarily of any vacancies that may have occurred.

We do not doubt that this may be done by the corporation. It would certainly be an extraordinary anomaly, if, while by the comity prevailing between the States the corporation was allowed to conduct its business, it could disavow the acts of those whom it has appointed to direct its business here, on the ground that the votes by which they were done were passed here. The case cited of *Miller v. Ewer*, 27 Maine, 509, to sustain the statement in Angell and Ames on Corporations, § 274, on which the demandants rely, only holds that a corporation established under a charter of the State of Maine could not organize in another State, and that the attempt so to do was void, but recognizes fully that a corporation duly organized, and acting within the limits of the State granting the charter, may, by agents duly constituted, act and contract without the limits of the State.

The demandants further contend, that, as the directors are trustees for the stockholders, even if the mortgage was valid, a

purchase by one of the directors of the property belonging to the corporation (the *cestui que trust*) is *prima facie* a purchase for the trust. If this proposition is correct, we cannot see that it would aid the demandants in maintaining this action. The title clearly passed to the purchaser, even if a director; and if the foreclosure sale could be avoided, or the purchaser declared to hold the property subject to a trust, this could only be done by the corporation or by its stockholders. *Cahill v. Bigelow*, 18 Pick. 369. *Wildes v. Vanvoorhis*, 15 Gray, 139, 145. The demandants, resting their title upon an execution recovered by one of the creditors of the corporation, cannot for this reason maintain a writ of entry. In an action to recover land, alleging a legal title in the demandant, such a title must be established. *Packard v. Marshall*, 138 Mass. 301.

Nor, if it were possible in favor of the demandants to hold that they were entitled to avoid the sale, could they be in a more favorable position than the mortgagor, who could not be allowed to do so except upon paying the sums which it has received from the tenants (only one of whom was not a director of the corporation, but was a stockholder) by the payment of its mortgage debt. We do not, however, intend to suggest that, as between the corporation and Spaulding, the director who purchased the land, the facts as they now appear show any reason why it should be permitted to avoid the sale. The sale was not the act of the directors, but of the mortgagee. It was his duty to obtain the highest price possible. While other directors were responsible on one of the mortgage notes, Spaulding was not. A director of a corporation is not prohibited from lending it moneys when they are needed for its benefit, and when the transaction is open, and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee under a deed of trust, executed to secure a payment of the debt, invalid. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587. *Holt v. Bennett*, 146 Mass. 437. It is agreed as a fact, that the sale was made in good faith to the highest bidder, and that in making the purchase the tenants were in fact acting in good faith. The law does not require that from their relation to the company the contrary necessarily is to be implied.

Judgment for the tenants.

RHODA N. LINTON vs. FRANK D. ALLEN.

Suffolk. March 8, 9, 1888. — June 20, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Vendor and Purchaser — Bond for a Deed — Condition — Payment — Good Title — Delivery of "Properly Executed Warranty Deed" — Evidence — Extrinsic Evidence.

A bond for a deed recited that the obligor had "bargained and sold" to the obligee certain land, part payment for which was to be in cash and the balance "on three promissory notes payable" in one, two, and three years, with the privilege of anticipating payments, and contained the condition that, if the obligor should deliver to the obligee "a properly executed warranty deed" upon the obligee's "making a demand for the same and fulfilling all the conditions therein stipulated, then this obligation to be void." *Held*, in an action on the bond, that the payment of the notes was a condition upon which the deed was to be delivered; and that the delivery simply of a properly executed warranty deed, without the giving of a good title, would not satisfy the bond.

Evidence of conversations between the parties at or about the time the bond was signed as to the deed and the title, as well as between the obligee and the husband of the obligor, after her death and while he was acting as special administrator of her estate, as to the same, was *held* to be properly excluded.

CONTRACT, against the administrator *de bonis non*, with the will annexed, of the estate of Chloe A. Berry. Writ dated June 22, 1886. The first count of the declaration was upon a bond for a deed, dated October 30, 1882, signed by the plaintiff and the testatrix, the material parts of which were as follows:

"The condition of this obligation is such, that whereas the said Berry has this day bargained and sold unto the said Linton for the sum of four thousand dollars a certain lot or parcel of land situated in the town of Cottage City, county of Dukes County and State of Massachusetts, on a plat known as Oak Bluffs. [Then followed a description of the premises.] And whereas it is agreed by the parties hereto that the said Linton, her executors and administrators, shall pay to the said Berry, her executors, administrators, or assigns, the sum of four thousand dollars, as follows, viz.: one thousand dollars cash; the balance of three thousand dollars, on three promissory notes payable as follows: one thousand dollars in one year, one thousand dollars in two years, one thousand dollars in three years. The agreement is that the said Berry shall receive all amounts tendered by

the said Linton at any time said Linton may wish, possession to be given March 1, 1883. Now, therefore, if the said Berry, her heirs, executors, administrators, or assigns, shall deliver unto the said Linton a properly executed warranty deed, the said Linton making demand for the same and fulfilling all the conditions herein stipulated, then this obligation to be void, otherwise to remain in full force and virtue."

Trial in the Superior Court, before *Blodgett, J.*, who allowed a bill of exceptions which, so far as material, was as follows.

Prior to October 30, 1882, the Oak Bluff Company conveyed the land in question to Mrs. Berry, by a deed containing a condition, a breach of which was to work a forfeiture of the estate and revest it in the grantor, that a dwelling-house to be erected on the land by her should be "used exclusively as a residence for a private family." After the conveyance to her, Mrs. Berry used the house for a boarding-house, and the plaintiff contended that this use was a breach of the condition of this deed. The Oak Bluff Company, however, had neither taken any steps to enforce a forfeiture of the land, nor released it from the condition of the deed.

One Smith, a real estate broker, testified that he had requested Mrs. Berry to give a deed of the land to the plaintiff, who had paid the \$1,000 and delivered the notes to her, and that in January, 1883, he wrote to Mrs. Berry at different times, at the plaintiff's request, asking for a title or deed to the property, for the settlement of the claim of the Oak Bluff Company, and for the clearing of the title, before the plaintiff proceeded to make certain repairs on the house, in response to which the husband of Mrs. Berry wrote to him, "At my wife's request, I reply; she says, go ahead and make the improvements contemplated, and she will make it all right"; and, again, "My wife wishes me to say in reply, that she will see that Mrs. Linton has a good title to the place according to agreement." The plaintiff testified that she took possession of the premises under the bond; that she had called upon the defendant after his appointment as administrator and asked him to clear the title and give her the title called for by the bond, to which he made no definite reply; and that she was ready to pay her notes when the title was made satisfactory. Evidence was offered by the plain-

tiff of conversations between the parties, on or about the time when the bond was given, as to the delivery of the deed and the clearing of the title, and also of conversations with the husband of Mrs. Berry, after her death, and while he was acting as special administrator of her estate, about the title to the property; but, upon the defendant's objection, this evidence was excluded. The husband of Mrs. Berry testified, on cross-examination by the defendant, that, in response to the assertion of the plaintiff, "You cannot give a good title," he said, "You will have just the title the bond calls for," and that a properly executed warranty deed of the property had never been withheld from the plaintiff.

The judge ruled that the plaintiff was not entitled to receive any deed of the property until she had paid her notes in full; that she was not entitled to claim a good title to the property, but only a properly executed warranty deed; and that she could not maintain her action; and ordered a verdict for the defendant. The plaintiff alleged exceptions.

F. S. Hesseltine, for the plaintiff.

W. Gaston & F. D. Allen, (*C. L. B. Whitney* with them,) for the defendant.

W. ALLEN, J. The first count of the declaration is upon a bond in the penal sum of \$4,000, given by Mrs. Berry, the defendant's testatrix, to the plaintiff. The condition recites that Mrs. Berry "has this day bargained and sold to the said Linton, for the sum of \$4,000, a certain lot or parcel of land," and that it is agreed that Linton shall pay to Berry the sum of \$4,000, \$1,000 in cash and "the balance of the \$3,000 on three promissory notes, payable as follows," \$1,000 each year for three years, and proceeds as follows: "The agreement is, that the said Berry shall receive all amounts tendered by said Linton at any time said Linton may wish, possession to be given March 1, 1883. Now, therefore, if the said Berry, her heirs, executors, administrators, or assigns, shall deliver unto the said Linton a properly executed warranty deed, the said Linton making demand for the same and fulfilling all the conditions herein stipulated, then," etc. The bond is dated October 3, 1882, and \$1,000 was paid, and three notes of the same date for \$1,000 each, payable to the order of Mrs. Berry in one, two, and three years, respectively, from March 1, 1883, were delivered.

We think that the payment of the notes was a condition upon which the deed was to be delivered. The plaintiff was to pay \$4,000; \$1,000 in cash, and the balance on notes payable at future times. The condition is not to pay at the time in notes, but on notes at future times. The notes were delivered at the same time as the bond, and unless the payment of the notes was the condition, there would have been none to be performed by the plaintiff; she would have already "fulfilled all the conditions herein stipulated," and would have had a right to demand a deed on the delivery of the bond, without furnishing any security for the payment of the notes. See *Healy v. Pfau*, 119 Mass. 589.

The agreement which appears in the condition of the bond is, that Mrs. Berry should sell the land to the plaintiff for \$4,000, — \$1,000 to be paid down, and \$1,000 within one year, \$1,000 within two, and \$1,000 within three years, — for which she was to give notes payable at three different dates, but with the privilege of anticipating payments, and that possession should be given on March 1, 1883, and the deed should be given upon the payment of the notes. The bond was given upon the payment of the \$1,000, and the delivery of the notes to secure the performance of the agreement by Mrs. Berry. Such a contract would not be performed by Mrs. Berry by tendering a deed which did not convey the title to the land; and her inability and refusal to give a good title would excuse the plaintiff from performing the conditions on her part to be performed, and entitle her to recover back the money paid. *Howland v. Leach*, 11 Pick. 151. *Swan v. Drury*, 22 Pick. 485. *Stone v. Fowle*, 22 Pick. 166. *Cook v. Doggett*, 2 Allen, 439. *Callaghan v. O'Brien*, 136 Mass. 378. *Gormley v. Kyle*, 137 Mass. 189. *Delapan v. Duncan*, 49 N. Y. 485, 487.

The recital in the condition of the bond, that "the said Berry has this day bargained and sold unto the said Linton," obviously means that Mrs. Berry has contracted to sell; and the contract is recited in the condition. It is argued that the condition of the bond, that Mrs. Berry shall deliver a properly executed warranty deed, shows that her agreement was to deliver a deed, and not to convey a title. But it seems plain upon the face of the instrument that the delivery of the deed was not a separate

and independent matter, but was to be made in pursuance of, and as a part of, the agreement to sell the land. The agreement was, on the part of the plaintiff, to pay the money to Mrs. Berry, and, on the part of Mrs. Berry, to sell the land to the plaintiff by a warranty deed. The payment of the money was the express condition upon which the deed should be given; the ability and readiness to give a title by a deed was the implied condition upon which the money should be paid. If Mrs. Berry had no title to the land, she could not recover on the notes.

The cases cited by the defendant to sustain the ruling of the court at the trial, that the plaintiff was not entitled to claim a good title to the property, but only a properly executed warranty deed, are *Aiken v. Sanford*, 5 Mass. 494; *Tinney v. Ashley*, 15 Pick. 546; *Gazley v. Price*, 16 Johns. 267; *Parker v. Parmele*, 20 Johns. 130, 135. Of the New York cases it is sufficient to say that they are overruled. *Burwell v. Jackson*, 9 N. Y. 535.

In *Tinney v. Ashley*, the plaintiff paid to the defendant the price of seven hundred and fifty acres of land, to be selected by the plaintiff from a larger quantity; and the defendant gave a bond, with the condition that, on being notified of the selection of the land and on the giving up of the bond, he "should execute and deliver to the plaintiff a good and sufficient warranty deed thereof." The fifth and sixth counts of the declaration alleged as a breach of the condition of the bond, that the defendant had no valid or legal title to the land, alleging an entry by the plaintiff upon the land, and an eviction of him. These counts were held bad on demurrer. The plaintiff had paid the purchase money in full, and the defendant had agreed to give a deed of the land as soon as the plaintiff should select it. The court held that the agreement of the defendant was to give a warranty deed, not to convey a valid title, and that the plaintiff intended to rely upon the covenants in the deed to protect him against defects of title. The only authority cited is *Gazley v. Price*, *ubi supra*.

Aiken v. Sanford was an action on a bond conditioned that the defendant, on the payment of certain notes by the plaintiff, should sell and convey to him, by a good and sufficient deed of warranty, certain lands. The defendant pleaded a tender of a deed on the ninth day of September. The plaintiff replied, that he paid the notes on the seventh day of June, and on the same

day the defendant tendered to him an insufficient deed, which he refused to accept, and that from the time of making the bond until the third day of September the land was encumbered by a mortgage. The court held the replication to be good on demurrer, on the ground that the deed tendered on June seventh was insufficient, and that the tender on the ninth of September was not within a reasonable time after the payment. Afterwards, on a hearing in equity to fix the amount for which execution should issue, it appeared that the notes were paid upon an execution issued upon a judgment recovered in a suit upon them, and that a sufficient deed was tendered in July, and the question arose upon granting the defendant leave to plead anew, to set up the facts thus appearing. It was objected, that the deed was not according to the condition, because at the time of the tender the land was encumbered by a mortgage.

The court overruled the objection in a *per curiam* decision, saying that, "if the deed was of proper form, and regularly executed, and the grantor was seised, so that the land was conveyed by it, the condition was, in this case, performed. But the court observed that they did not mean to determine that in no case these words should be considered as applying to the title. If the money was to be paid on receiving the deed, it might be a reasonable construction, that a good and sufficient title should be conveyed; otherwise the purchaser might part with his money, not merely for the land, but for a lawsuit also. In the present case, however, the money was to be first paid, and the plaintiff might as well sue on the covenants in his deed, as on his bond." The parties and the court regarded the obligation to pay the notes as absolute and unconditional. Judgment had been recovered upon them and they had been paid while the breach of the condition of the bond upon which the plaintiff relied was in existence, though it was cured before the action on the bond was commenced.

We are unable to give such a construction to the bond in suit. The payment of the money and the delivery of the deed upon demand were to be concurrent acts, although the one was expressed to be the condition of the other. The right to demand the deed would arise simultaneously with the payment of the money; and it is the common case of mutual conditions or

concurrent acts, that the refusal to perform by one party will excuse the other, who is not in default, from performance on his part. See *Tinney v. Ashley*, *ubi supra*.

If the notes had been taken as payment for the land, and the contract had been executed on the part of the plaintiff, so that all that remained to do was the giving of a deed by Mrs. Berry, upon demand, the cases cited might be applicable; but upon the construction which we have given to it, it comes rather within the exception suggested in the earlier cases, and within the general rule that an agreement to sell land, and to give a good and sufficient deed of it, means a deed that will convey a good title to the land. See, in addition to the cases cited, *Mead v. Fox*, 6 Cush. 199; *Packard v. Usher*, 7 Gray, 529; *Washington v. Ogden*, 1 Black, 450, 456; *Wellman v. Dismukes*, 42 Mo. 101; *Haynes v. White*, 55 Cal. 38; *Taft v. Kessel*, 16 Wis. 278; *Cunningham v. Sharp*, 11 Humph. 116; *Owings v. Baldwin*, 8 Gill, 337.

We find no error in the exclusion of evidence. We think, as the case stood, that the plaintiff was not entitled to demand a deed of the property until she had paid or was ready to pay her notes in full; that she was entitled to claim a good title to the property and not a properly executed warranty deed only; and that there was some evidence that she had demanded a deed, and performed the conditions on her part so far as she was required to.

Exceptions sustained.

JAMES BENSON vs. EBEN P. GOODWIN & others.

Suffolk. March 12, 13, 1888. — June 20, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Personal Injuries — Negligence — Master and Servant — Mate and Common Seaman are Fellow Servants.

A mate of a vessel and a common seaman shipping therein are fellow servants; and if the seaman, in acting under the mate's orders, while both are carrying out a direction of the captain to the mate, is injured by the latter's negligence, he cannot maintain an action against the owners for such injury.

TORT for personal injuries sustained by the plaintiff while in the employment of the defendants, who were part owners of the ship Benjamin F. Packard.

At the trial in the Superior Court, before *Mason, J.*, the only issue tried was whether the plaintiff could recover if his injuries were caused by the negligence of the mate of the ship. Evidence was introduced tending to prove that the plaintiff shipped as a sailor or runner to assist in taking the vessel from Bath, Maine, where she had just come off the stocks, to New York, but there was no evidence to show whether or not the plaintiff signed any shipping articles; that the captain had ordered the mate to get the vessel under way; that, as the vessel was being towed down the river, the plaintiff with others was engaged, under the orders of the mate, in getting up the port anchor; that as the anchor, which had movable flukes, was being raised by the capstan by means of a line attached to one of the flukes, it was caught in a moulding projecting from the side of the vessel; that the mate ordered the plaintiff to go over the side to pass a line to free the anchor; and that, as the plaintiff was standing on the shank of the anchor, having passed the line as ordered, and having called for another line to assist him in getting on the deck, the mate ordered the man at the capstan to slack away on the line attached to the fluke, thus allowing it to fall upon the plaintiff's foot and causing the injury.

The defendants asked the judge to rule that a common sailor and a mate are fellow servants, and that therefore the plaintiff could not recover; but the judge refused so to rule, but ruled that a common sailor and a mate were not fellow servants, and that the defendants would be liable for the injuries if the plaintiff was injured by reason of the mate's negligence. The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

C. B. Southard & R. Bradford, for the defendants.

L. W. Howes, (*C. G. Abbott* with him,) for the plaintiff.

W. ALLEN, J. The plaintiff and the mate were employed by the same master in a common service. They were engaged in getting up the anchor, under the order of the captain to the mate to get the vessel under way, the mate having the direction of the work, and the plaintiff acting under his orders. Unless

the case is an exception to the well established rule in this Commonwealth, the plaintiff and the mate were fellow servants. See *Rogers v. Ludlow Manuf. Co.* 144 Mass. 198, and cases cited.

The plaintiff contends that the case of mate and common seaman on a merchant vessel is an exception. We can see nothing in the evidence reported which excepts this case from the rule applied to a superintendent of work and one working under his orders. *Peterson v. The Chandos*, 4 Fed. Rep. 645, 649, *Daub v. Northern Pacific Railway*, 18 Fed. Rep. 625, and *Sullivan v. The Neptuno*, 30 Fed. Rep. 925, are cited to sustain the ruling of the court, that a common sailor and a mate are not fellow servants. The first case contains on this point dicta only of Deady, J.; the second case contains a report of an oral charge to a jury by the same judge, which expressly assumes the responsibility of instructions against the admitted probable weight of authority; the third case was against the owners of a vessel, one of whom was the master, for negligence of the master.

Whether a person who was taking a run from Bath to New York as a "sailor or runner," without signing shipping articles, would be a common sailor within the meaning of such a rule, we cannot decide, because we do not find any such rule. See *Halverson v. Nisen*, 3 Sawyer, 562; *Olson v. Clyde*, 32 Hun, 425; *The City of Alexandria*, 17 Fed. Rep. 390; *Malone v. Western Transportation Co.* 5 Bissell, 315; *Mathews v. Case*, 61 Wis. 491; *Loughlin v. State*, 105 N. Y. 159; *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209.

If we are asked to establish a special rule, applicable only to mates of vessels and common sailors, on the ground of the peculiar relations between them, the existence and particulars of those relations must be shown. The evidence in the case at bar discloses only facts which, under the decisions of this court, show that the mate and the plaintiff were fellow servants of the defendant.

Exceptions sustained.

NANTASKET BEACH RAILROAD COMPANY *vs.* CHARLES A.
RANSOM.

SAME *vs.* SARAH E. RANSOM.

SAME *vs.* LYMAN MASON.

Suffolk. March 16, 19, 1888. — June 20, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Review — Judgment — “ Civil Action.”

A judgment of the Superior Court upon the verdict of a jury assessing damages upon the petition of one whose land has been taken for a railroad, is a judgment in a “civil action,” within the meaning of the Pub. Sts. c. 187, §§ 16, 22, authorizing writs of review.

A petition to this court for the review of such a judgment is not barred by a former petition to the Superior Court, which was not filed and of which there is no record, but which was presented merely to a justice of that court, who refused to grant an order of notice thereon.

THREE PETITIONS, filed October 16, 1884, for writs of review of judgments of the Superior Court. The cases were heard together before *Devens*, J., who reported them for the consideration of the full court, in substance as follows.

The respondents severally filed petitions to the county commissioners for the county of Plymouth for the assessment of damages for land taken by the petitioner for its railroad, and the commissioners, having ordered the company to give security for any damages that might be awarded by them, which was done, proceeded to award as such damages, on January 2, 1882, to Charles A. Ransom, \$1,700; to Sarah E. Ransom, \$950; and to Lyman Mason, \$270. Appeals were duly taken by the railroad company to the Superior Court for that county, and the cases were tried at the October term, 1883, verdicts being found against the company, on November 16, 1883, for Charles A. Ransom, \$9,497.50; for Sarah E. Ransom, \$1,966.56; and for Lyman Mason, \$996.50. The company were duly notified that the actions were to be placed on the trial list for that term, but, owing to some misapprehension on the part of its counsel, it was not represented at such trials. Judgments were entered upon

the verdicts on November 22, 1883, and executions issued thereon on December 13, 1883. The counsel for the railroad company had no notice of the trials or judgments in the Superior Court until more than four days after the adjournment of the court for that term, and upon receiving this information he presented to the justice of the Superior Court who presided at the trial petitions for writs of review in the cases, and requested an order of notice thereon, which the judge declined to grant. No further action was had in the Superior Court; the petitions for writs of review were not filed with the clerk of said court; and there are no entries of record therein relating to the matter.

The executions remained unpaid, and a justice of this court, at a hearing upon bills in equity, filed by the respondents, on August 6, 1884, to restrain the company from entering upon or using the lands, ordered the company to pay to the respondents, without prejudice, before September 1, 1884, an amount equal to the award of the county commissioners and interest, with the costs taxed before them and in the Superior Court, the company assenting to judgments against it for this amount. On August 30, 1884, the company paid to each respondent the portion of the amount so ordered to be paid, and agreed to release a portion of the land taken in lieu of the amount remaining unpaid; but no such release had been given, nor any further amount paid.

A review was to be granted only in case the full court should be of opinion that the cases were such that writs of review might be granted therein, and that the company had not lost its right to apply for such writs of review by reason of its previous application to the Superior Court and the refusal thereof; and, in any event, a review was to be granted as to the excess only over and above the awards of the county commissioners, with interest thereon, and with the costs taxed before them and in the Superior Court.

H. L. Harding, (*R. M. Morse, Jr.* with him,) for the petitioner.

L. Mason, for the respondents.

W. ALLEN, J. These are petitions for writs of review of judgments of the Superior Court upon verdicts of juries in that

court, assessing damages, upon the petitions of the respondents, for lands taken by this petitioner for its railroad.

The first question is, whether the statute authorizes a review of such a judgment. The Pub. Sts. c. 187, § 16, provide that "final judgments in civil actions may be re-examined and tried anew, as provided in the following sections." Section 22 provides, "If judgment is rendered in a civil action, either by the Supreme Judicial Court or Superior Court, the Supreme Judicial Court, except when a review is prosecuted as of right, may on petition grant a review on such terms as it deems reasonable." The Pub. Sts. c. 112, § 95, authorize railroad corporations to take land, and provide that they shall pay damages therefor, which, upon the application of either party, shall be estimated by the county commissioners, in the manner provided with reference to the laying out of highways. Section 99 gives to either party, if dissatisfied with the estimate of the county commissioners, a right to apply for a jury to assess the damages. The statute in relation to highways gives to a party aggrieved by the estimate of damages made by the county commissioners, a right to a trial by a sheriff's jury, upon a written application to the commissioners. Pub. Sts. c. 49, §§ 32-37. Section 105 of c. 49 provides, "In all cases in which it is provided by law that a sheriff's jury may be had for any purpose, application for a jury may be made by petition to the Superior Court; and thereupon, after such notice as said court shall order to the adverse party or parties, a trial may be had at the bar of said court, in the same manner as other civil cases are there tried by jury."

In the cases at bar the applications to the county commissioners to assess damages were made by the respondents; the petitions to the Superior Court for a jury were made by this petitioner; and the question is, whether the judgments of that court upon verdicts of the jury are judgments in a "civil action," within the meaning of the statute authorizing writs of review. In substance, the proceedings are civil actions. The trials were of issues of fact by juries; the verdicts were for damages; and executions issued on the judgments. The statute itself includes the proceedings with "other civil cases."

These were "cases" to ascertain and enforce the collection of damages due from this petitioner to the respondents, and the

only ground upon which it is claimed that they are not "civil actions" is that they were not commenced by writ. We regard it as immaterial in this respect whether the statute authorized them to be commenced by petition or by writ. The issues and the course of trial would be the same, whether the defendants were required to come in on a writ of summons or upon notice ordered on the filing of a petition. If the legislature should abolish all original writs, and require all actions to be commenced by petition, writs of review would survive.

In *Dickenson v. Davis*, 4 Mass. 520, it was decided that a review of a judgment of the Court of Common Pleas upon the report of referees appointed by a justice of the peace would not lie under the statute. The court say: "When a review is grantable, the cause must be triable on a review; it must, therefore, be commenced by writ, containing a declaration, to which a plea may be pleaded, and an issue joined and tried. The origin of the judgment complained of in this case was not by writ, but by a general rule of reference before a justice, containing no demand alleged with sufficient certainty to admit of a plea and of a trial at law upon an issue that could be regularly joined." It is obvious that the court does not refer to the form of original process as determining the question of jurisdiction in review, but to the writ containing the declaration as part of the pleadings. Review would not lie, not because the original process was not a writ, but because in the form of proceeding there could be no cause of action stated, and no pleadings, and no issue which could be tried. The same point is decided, and the reasons for the decision given more at large, in *Stone v. Davis*, 14 Mass. 360, but no reference is there made to the absence of a writ.

In *Pope v. Pope*, 4 Pick. 129, it was decided that the court had no authority to grant a review, or a new trial, on an issue arising on an appeal from the judge of probate after judgment had been entered on the appeal; and in *Lucas v. Lucas*, 8 Gray, 136, it was decided that there was no authority to grant a review in libels for divorce. *Borden v. Bowen*, 7 Mass. 98, decided that a review did not lie of a judgment on a petition for partition of lands. The court say, "Reviews are provided only where the original action is commenced by writ." Chief Justice Shaw

said, in 1854, in *Lucas v. Lucas*, at page 139, "Perhaps that would now be holding the matter rather too strictly."

In *Hubon v. Bousley*, 123 Mass. 368, it was held that a review would lie of a judgment on a petition to enforce a mechanic's lien. The petition was inserted in a writ of summons. The statute provided that the petition might be filed, and an order of notice issued, or that it might be inserted in a writ of summons. The court say, "We can have no doubt that a final judgment upon such a petition, at least when, as in this case, that petition was inserted in a writ, may be the subject of a writ of review." It cannot be contended that the right to review the judgment depended upon the form of the process.

The cases at bar are actions to recover damages. The petitions are statements of the causes of action; there are issues which have been tried, and which are triable on review. To hold that they are civil actions within the meaning of the statute, if service of the petition is made by inserting it in a writ before it is filed, and that they are not civil actions if service is made by inserting the petition after it is filed in an order of notice, is to find a distinction which is not within the language or reason of the statute, and which is not established by any decision. The decisions that the statute does not apply to decrees in probate and divorce, and that it does not operate to grant a trial in court of facts found by arbitrators under a submission before a justice of the peace, nor to give a review of a partition of lands made by commissioners under the St. of 1783, c. 41, which is all that is decided in the cases cited above, do not sustain the dicta upon which the respondents rely, that a review cannot be had of an action unless it is commenced by writ.

The only other question presented in the report is whether the refusal of the justice of the Superior Court to order notice of petitions for review presented to him by the petitioner is a bar to these proceedings. The record of the dismissal of a former petition upon its merits might be a bar to a second petition. But there is no record of the former petitions. They were not even filed, and were never in court; there was no judgment upon them, and no decision which could be revised by the full court. The respondent cannot establish a bar to this petition

by parol proof of the acts of the judge *in pais* in reference to a paper which is not matter of record. See *Burrell v. Burrell*, 10 Mass. 221; *Hayes v. Collins*, 114 Mass. 54.

Writs of review to issue.

RUSSELL B. PRATT *vs.* INHABITANTS OF WEYMOUTH.

Norfolk. March 19, 20, 1888. — June 20, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Defect in Highway — Derrick — Highway Surveyor — Town Agent — Negligence.

A derrick standing in a highway, and so insecurely supported that, by reason of its use by workmen in lifting stones for the repair of a culvert, it falls and injures a traveller, is not a defect, within the Pub. Sts. c. 52, § 18, such as will render a town liable for the injuries.

If the highway surveyor within whose district the culvert was situated, and whose duty it was to make the repairs, was directing the same, the mere facts that the town made a special appropriation for the work, and that the selectman who had general oversight of the district told the surveyor that the appropriation had been made for that purpose, and that the work was for him to do when the proper time arrived in the general work, furnish no evidence that the surveyor, instead of acting as a public officer, was the town's agent, for whose negligence it would be liable.

TORT for personal injuries. The first count of the declaration set forth a cause of action under the statute for injuries occasioned by a defect in Commercial Street, a highway which the defendant was bound to keep in repair, and alleged that a derrick erected for the repair of a culvert in that street was so insufficiently supported that it fell, by its own weight and by that of a load placed upon it, upon the plaintiff, who in the exercise of due care was lawfully travelling upon the street, due notice of the time, place, and cause of injury being given. The second count of the declaration set forth a cause of action at common law for the injuries, and alleged that the defendant town, having voted to widen the culvert, which the defendant was bound to keep in repair, and having appropriated money therefor, in executing the work by its agents and servants

erected a derrick near the centre of the street for hoisting stone, and so negligently and improperly secured it that it fell, by its own weight and by that of a stone being lifted by it, upon the plaintiff, then using due care and in the lawful use of the street, and greatly injured him.

At the trial in the Superior Court, before *Blodgett, J.*, evidence was introduced tending to prove the following facts.

The plaintiff, who was a boy twelve years of age, was, prior to the accident, passing along the street a little after noon on his way to school, and sat down upon a rock to watch the operation of the derrick. Upon being warned that his position was not a safe one, he got up, and was starting along the street when he was struck and injured by the fall of the derrick. It was admitted that Commercial Street was a highway which the defendant was bound to keep in repair, and that proper notice of the injury had been given to the defendant. The culvert extended across the street over a running stream, and was about three and a half feet wide and two feet deep, being covered on top with stones and dirt to the depth of several inches. It had become obstructed, and was being made four feet wide and four feet deep for the freer passage of the water, the side walls being constructed of heavy stones. The repairs upon one half of the culvert, extending to the middle of the street, had been completed, and that portion had been put in order for use, and the work was being prosecuted on the other half. No signs or barriers were put up to warn travellers, except that the earth and stone from the uncompleted portion were piled up between it and the portion completed. The derrick had been erected near the centre of the street a day or two prior to the accident, which occurred on April 23, 1885, and was being used in the prosecution of the work for the handling of heavy stones. One of four guys by which it was supported extended into an adjoining meadow, the soil of which was soft and wet, and was there attached to a railroad sleeper buried in the ground. A chain, to which the guy was fastened, encircled the sleeper, which lay crosswise to the guy and was covered with earth to the depth of fifteen inches or two feet. At the time in question the workmen operating the derrick were engaged in hoisting a heavy stone, weighing about one thousand pounds, which was

to be placed in the side wall of the culvert, and the strain upon the guy was such that the sleeper was pulled out of the ground, and both the mast and boom of the derrick thereupon fell into the street, one of them striking the plaintiff and inflicting severe injuries upon him.

At the annual town meeting, held on March 2, 1885, the defendant town voted, under appropriate articles in the warrant, "to raise and appropriate for highways, town ways, and bridges \$9,000, \$700 to be expended by each highway surveyor, balance by selectmen," and "to raise and appropriate the sum of \$200 for the purpose of enlarging the drain across Broad Street, . . . also the drain across Commercial Street." Five selectmen and five highway surveyors were elected in the defendant town in that year, one of each class being assigned to each of the five wards of the town. Thomas H. Humphrey was the selectman in charge of Ward Two, in which Commercial Street was situated. At a meeting of the selectmen held on March 6, 1885, an assignment was made of the highways, town ways, and bridges in each ward to the surveyor chosen for that ward at the annual meeting, in pursuance of which the following notice was sent:

"To Weston H. Cushing, Surveyor of Highways for the town of Weymouth: All the highways, town ways, and bridges within the limits of Ward 2 are assigned to you to keep in repair during the current year."

Subsequently Cushing took charge of the work on the culvert, both he and one Richards presenting bills therefor to the defendant, which were paid by warrants drawn by the selectmen.

Cushing testified as follows: "Thomas H. Humphrey told me there was an appropriation of \$200 for widening the bridge across Broad Street, also across Commercial Street, and that it would come in with the general work when it came the proper time to do it, or when I saw fit to do it, something like that,—I cannot give his exact words. I got Richards to do the stone-work. The selectmen attended to any small affair for the highways in their ward. The culvert was possibly two feet deep inside the stone-work. It was filled with stuff that had collected there. It was four feet wide and four feet deep when we left it. A stream of water flows through it at all seasons of the year. It comes from a small artificial ornamental pond,

dammed up from a spring. I know that this work was done outside of the regular appropriation. . . . I told Mr. Humphrey there were \$200 to spend there. Humphrey told me it would come in with my general work. . . . Cannot swear now what Humphrey did tell me to do about it. In substance Humphrey told me the work was for me to do, when the proper time arrived in the general work. . . . I probably had about \$1,700 that year; I think the records show I had that. That is all the way I can answer whether I had the \$700. I did not get it at one time; but when I did any work as surveyor of highways, I got my pay for it and the pay for my men. I have more or less men in my employ all the time."

The judge ruled that, upon this evidence, the action could not be maintained, directed a verdict for the defendant, and reported the case for the determination of this court. If the ruling was correct, judgment was to be entered on the verdict; otherwise, a new trial was to be granted.

R. D. Smith & C. Q. Tirrell, (N. H. Pratt with them,) for the plaintiff.

1. A derrick defectively supported, and standing in the highway so that it falls when in use, is a defect for which a town is, or may be liable. *Drake v. Lowell*, 13 Met. 292. *Pedrick v. Bailey*, 12 Gray, 161, 163. *Day v. Milford*, 5 Allen, 98. *West v. Lynn*, 110 Mass. 514. In *Barber v. Roxbury*, 11 Allen, 318, the derrick was outside the highway, and not in use by the servants of the town or intended to be used by the town, and a majority of the court held that it was not a defect. The case of the snow projecting beyond the roof of the church, which was held not to be a defect, is easily distinguishable. *Hixon v. Lowell*, 13 Gray, 59. See also *Jones v. Boston*, 104 Mass. 75, 77. It is for the jury to decide, upon all the evidence, whether the derrick so placed and supported did not render the way dangerous for travellers, and therefore constitute a defect. *Ghenn v. Provincetown*, 105 Mass. 313, 316. *Dowd v. Chicopee*, 116 Mass. 93. There seems to be no reason why that which might be a defect if left to itself is not also a defect when used by the town, and in use for the very purpose for which it was erected. A stone may be a defect for which the town is liable, though moved from place to place in the highway within

twenty-four hours before the accident. *Maccarty v. Brookline*, 114 Mass. 527. See also *Graves v. Shattuck*, 35 N. H. 257. It is not easy to define, as matter of law, what can be said to be a direct rather than a remote cause contributing to the injury. The question is to be determined to a great extent by the evidence in each case bearing upon the complicated relations of cause and effect. *Smith v. Boston & Maine Railroad*, 120 Mass. 490, 493. If a stranger had exerted a force upon the derrick, or upon the handle of the windlass of the derrick, which caused it to fall upon the plaintiff, it might be a question of *proxima causa*, as in *Marble v. Worcester*, 4 Gray, 395. If by reason of a defect — which means something rendering the highway unsafe for travellers — a person is injured, he may recover for the injury, whether that which constitutes a defect be in use or not. A drawbridge is often laid out as a highway, and the draw has to be raised and let down. If, when suspended, it fell upon a passenger, by reason of an insufficient chain, it would be within the awning case, and also constitute a defect; and not less so, if it fell while being hoisted. It is to be observed that the injury took place in the travelled part of a highway, one part of which was occupied by the work which was going on, and in which no barriers were erected. Therefore the words of the statute apply, which provide that the town shall be liable if the "damage or injury might have been prevented by reasonable care and diligence" on the part of the defendant. See Pub. Sts. c. 52, § 18. The quoted words have not received full interpretation as yet. See *Hayes v. Cambridge*, 136 Mass. 402. The statute is evidently more extensive in meaning than the former statute, under which most of the cases were decided.

2. Under the second count, the town may be liable for an injury caused by the carelessness of persons employed by the town to do work which it is bound to do, or which it assumes to do. *Deane v. Randolph*, 132 Mass. 475. *Waldron v. Haverhill*, 143 Mass. 582. It could have done the work by any agent or servant, and would have been liable for the negligence of such employee; and it made no difference that the employee in this case was the surveyor of highways, as in *Hawks v. Charlemont*, 107 Mass. 414. *Deane v. Randolph*, *ubi supra*. The town of Weymouth did employ Cushing, as is shown by the conversa-

tions between him and the selectman for the ward, and by the payments made to Cushing and Richards by warrants drawn by the selectmen. The thing done in this case was not a work within the ordinary scope of a surveyor's duty. He could not have been required to enlarge the drain across Commercial Street, nor could he have been indicted for failing so to do. See Pub. Sts. c. 52, §§ 7-12. *Jones v. Lancaster*, 4 Pick. 149. It may be very easy to imply from facts the employment of a town surveyor in other works than those which he is bound to do. The selectman said to him that it would come in with his regular work. It was not his regular work, but would come in with his regular work. *Day v. Caton*, 119 Mass. 513. *Brigham v. Foster*, 7 Allen, 419. It may be interesting to inquire how far a highway surveyor may go beneath the surface of highways, or disturb existing structures, like bridges, under the pretence of repairs. It is probable that his duties are confined to the surface of the ground. *Callender v. Marsh*, 1 Pick. 418. *Loker v. Brookline*, 13 Pick. 343.

H. E. Swasey, (*R. M. Morse, Jr.* with him,) for the defendant.

DEVENS, J. The Superior Court having ruled upon the evidence offered by the plaintiff that he was not entitled to recover, and having ordered a verdict for the defendant, the question is presented, whether, upon either of the two causes of action set forth in the different counts of the plaintiff's declaration, he was entitled to have the case submitted to the jury. We shall not have occasion to consider whether the plaintiff was to be deemed a traveller upon the highway, which the defendant was bound to keep in repair, or whether, if the cause of the injury to the plaintiff was a defect therein for which the defendant was responsible, it had sufficient notice thereof, or whether proper notice of the injury, as required by statute, was given to the defendant before the action was brought, but shall assume that these subsidiary or preliminary inquiries should be answered in favor of the plaintiff.

The ground upon which the plaintiff sought to recover under his first count was by virtue of the statute, for an injury received through a defect or want of repair in the highway which the defendant was bound to maintain. Pub. Sts. c. 52, § 18. There was evidence that a derrick was erected and standing in the

travelled part of the road, to be used in repairing a culvert which extended across the road, and that the derrick was insufficiently and insecurely supported, one of the guy ropes extending into a neighboring meadow, and being there attached to a railroad sleeper buried in the ground, but so defectively fixed that it was pulled from its position by the weight of the derrick and by that of a stone which was being lifted thereby. By reason of this, the derrick, while thus in use by the workmen, fell upon the plaintiff, then passing in the highway, and injured him.

Whether a derrick standing in the highway and impeding travellers thereon, if one had actually collided with it, and whether a derrick thus situated, and so insecurely fixed that it was liable to and did fall from its own weight, or from purely natural causes, could be held to be a defect for which a town would be responsible, are questions not necessary now to discuss. The position of the plaintiff is, that a derrick standing in the highway, and defectively supported so that it falls when in use, is a defect for which the town is or may be liable, and thus that a machine used on the highway for the purpose of repairing it, controlled, worked, and manipulated at the time by workmen, becomes a defect, if by reason that it is thus operated, and that it is not sufficiently supported, injury is occasioned by its fall to one lawfully on the highway. To maintain his proposition the plaintiff relies much on *Drake v. Lowell*, 13 Met. 292, *Day v. Milford*, 5 Allen, 98, and *Pedrick v. Bailey*, 12 Gray, 161, 163, sometimes familiarly known as the awning cases. These decisions were put exclusively on the ground of the insufficient strength or defective condition of structures which were not mere incidents or attachments of the building, but were adapted to the sidewalk, and were a part of its construction and arrangement for use as such. It was deemed that danger from their insecure condition might properly be treated as arising from a defective or unsafe condition of the sidewalk. Where a sign, attached to the building only, fell, it was held, as in the case where ice overhung the sidewalk, that there was no liability of the town as for a defective highway. *Jones v. Boston*, 104 Mass. 75. *Hixon v. Lowell*, 13 Gray, 59. But in a case where a sign or transparency was supported above the sidewalk by a pole or post placed thereon, and injury was occasioned by the fall of the pole, it was held to

come within the cases in regard to awnings above cited. *West v. Lynn*, 110 Mass. 514. This class of cases has been repeatedly said to express the extreme limit, in this direction, to which the liability of towns should be extended. *Barber v. Roxbury*, 11 Allen, 318. *Jones v. Boston*, *ubi supra*. In all of them, the injury done was occasioned by the operation of purely natural causes, and did not proceed from any human agencies, as where a machine is controlled and managed by the laborers engaged thereon.

In *Barber v. Roxbury*, *ubi supra*, a rope was stretched across a highway, attached at each end to objects outside the limits of the highway, and when not in use lay loosely on the ground, not forming any obstruction to public travel until the men engaged in moving stone by means of the derrick raised the rope gradually by turning the crank to which it was attached, so as to lift the rope from the ground across the travelled space. The rope, while being so raised, struck the plaintiff's carriage, and injured her. It was held that such injury could not be said to have been caused by any defect or want of repair in the highway.

The liability for defective highways is a limited one. It has long been settled that a plaintiff cannot recover unless the defect is the sole cause of the injury. Where this follows from a defect united with some distinct, efficient, concurring cause, without which it would not have happened, unless, as suggested by Chief Justice Shaw in *Marble v. Worcester*, 4 Gray, 395, such concurring cause be pure accident, the plaintiff cannot recover. *Rowell v. Lowell*, 7 Gray, 100. *Kidder v. Dunstable*, 7 Gray, 104. *Lyons v. Brookline*, 119 Mass. 491.

Even if it be conceded, therefore, that the derrick was such a defect in the highway that, if the plaintiff had collided with it, himself exercising due care, or if by its own weight, or from any natural cause, by reason that it was insufficiently secured, it had fallen upon and injured him, he might have recovered, such is not the case at bar. It was the act of the workmen, who employed the machine in lifting weights for which it was not properly constructed, that contributed to the plaintiff's injury, and was the immediate moving cause of it. But for this there is no reason, from the evidence, to suppose it would have occurred.

If the defendant is responsible for the act of those who were managing the machine, that would be a liability entirely different from that arising from its obligation to maintain the way, which we shall have occasion hereafter to consider. The derrick did not thereby become a defect in the highway, by the fall of which the defendant was subjected to the statutory liability.

The only case to which we have been referred, or which we have found, where a town has been held responsible, under a statutory liability for a defect in the highway, to a traveller injured therein, in consequence of a defective structure under the control of human agency, and being thus used and worked, is *Hardy v. Keene*, 52 N. H. 370. Apparently the rule in New Hampshire is different from that established in this Commonwealth, and towns are held liable for defects in a highway, even where a distinct and independent cause contributes to the injury, unless the traveller's own carelessness is also a contributory cause. The cases in other States, where legislation and judicial decision differ, cannot always be safely followed. We are not disposed to accept the proposition, that a machine under the active charge of individuals is to be treated as a defect in the highway if injury results from its operation, and not merely from its presence there.

If the defendant was not under a statutory liability to the plaintiff because of a defect or want of repair in the highway, the plaintiff also sought to recover against it upon a common law liability for the negligence of its agents and servants employed by it in doing certain work which it had undertaken. This cause of action is set forth in the second count of the plaintiff's declaration, and there was evidence that in the erection of an insufficiently supported derrick, and in the operation of it in lifting weights which it was inadequate to sustain, there was negligence on the part of those doing the work of making or repairing the culvert across the road, in which they were engaged.

The question is therefore presented, whether, upon the evidence, Cushing, the person doing the work, and those engaged with him, are to be treated as the agents or servants of the defendant. Cushing was a highway surveyor, regularly chosen as such by the town, and the work was being done within the

district assigned to him. That a town is not responsible for the acts of highway surveyors, or the men employed by them, in doing duty imposed upon them by law in the repair of highways, has been repeatedly decided, and the reasons for this exemption have often been stated. *Hafford v. New Bedford*, 16 Gray, 297. *Barney v. Lowell*, 98 Mass. 570. *Walcott v. Swampscott*, 1 Allen, 101. *Tindley v. Salem*, 137 Mass. 171. *Cushing v. Bedford*, 125 Mass. 526. *Manners v. Haverhill*, 135 Mass. 165, 171. *McKenna v. Kimball*, 145 Mass. 555. *Clark v. Easton*, 146 Mass. 43.

That a town, although it has duly chosen surveyors of highways, may, from time to time, or for special reasons or occasions, undertake to repair its ways and bridges in some other than the regular and statutory manner, and may select and employ men as its agents for this purpose, in which case it would be responsible for torts committed by them, must also be conceded. *Hawks v. Charlemont*, 107 Mass. 414. *Deane v. Randolph*, 132 Mass. 475. *Sullivan v. Holyoke*, 135 Mass. 273. *Tindley v. Salem, ubi supra*. *Waldron v. Haverhill*, 143 Mass. 582. Nor, if the town had undertaken to make the repair of the drain or culvert through an agent selected for the purpose, whom it was entitled to control in the performance of his work, would it be, perhaps, important that such agent was also a highway surveyor.

But in the case at bar the town selected no agent to do this work. It did, indeed, pass a vote "to raise and appropriate \$200 to enlarge the drain across Broad Street, . . . also the drain across Commercial Street," in the performance of which latter work the injury complained of by the plaintiff occurred; but there is nothing to show that it was not left to be performed by the public officers whom it had chosen according to law, and on their official responsibility as such. The work was itself the repair of a highway, within the scope of Cushing's authority and duty as highway surveyor. In performing it, he had no authority from the town to act otherwise than as a public officer, nor did he attempt to do so, as far as the evidence shows. If he had done so, it would not be important, as it would not be in his power alone to divest himself of his public character and constitute himself the servant of the town. Nor, if it were possible to construe the appropriation for enlarging the drain on Commer-

cial Street, as the plaintiff urges it may be, — in which position we do not concur, — as requiring the selectmen to do this work by employing some suitable person as a servant of the town, does the case afford any evidence that Cushing was thus employed.

A general direction is given to the selectmen over the work of highway surveyors in their respective districts, to see that the money appropriated to such districts is carefully and judiciously expended. Pub. Sts. c. 52, § 3. *Benjamin v. Wheeler*, 15 Gray, 486, 490. The responsibility of doing the work, directing the laborers, and taking charge of the repairs, is that of the highway surveyor.

The facts that Humphrey, one of the selectmen, told Cushing that there was an appropriation of \$200 to spend in widening the drain across Commercial Street, and that it would come in with the general work when it was the proper time to do it, or when Cushing "saw fit to do it," or that, as Cushing afterwards states, "In substance, Humphrey told me the work was for me to do, when the proper time arrived, in the general work," furnish no evidence of any engagement or contract with Cushing as the agent of the town, or of the selectmen, even if the selectmen had authority to make such engagement.

Judgment on the verdict.

BENJAMIN F. BATES vs. OLD COLONY RAILROAD COMPANY.

Suffolk. March 20, 1888. — June 20, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Railroad Company — Negligence — Express Messenger — Riding in Baggage Car — Agreement to assume Risk — Contributory Negligence — Public Policy.

If an express messenger holding a season ticket from a railroad company and desiring to ride for the conduct of his business in a baggage car in contravention of its rules, agrees to assume all risk of injury therefrom, and to hold the company harmless therefor, the agreement is not invalid as against public policy, and he cannot recover for injuries caused by the negligence of the company's servants, to which his presence in the baggage car directly contributed.

TORT for personal injuries sustained by the plaintiff, on November 4, 1885, in an accident upon the defendant's railroad while he was riding in a baggage car. At the trial in the Superior Court, before *Sherman, J.*, evidence was introduced tending to prove the following facts.

It was conceded by the defendant, that the accident resulted from negligence on the part of its servants, and that the plaintiff, if rightfully in the car, was, at the time of the accident, in the exercise of due care. None of the passenger cars in the same train with the baggage car were thrown from the track by the accident, and no person in them was injured.

The plaintiff was employed as an express messenger by the New York and Boston Despatch Express Company, which was carrying on the express business over the road of the defendant between South Framingham and Fitchburg. On January 1, 1885, and at the time of the accident, the contract between the defendant and the express company was, that the defendant should transport the express matter at a specific price, and should transport the messengers of the express company in its express cars or baggage cars at season ticket rates, which were less than regular rates, paid by the express company upon condition that the express company and its messengers should assume all risks of accidents and injuries resulting therefrom, and hold the railroad free and discharged from all claims and demands in any way growing out of any injuries received by such messengers while being thus transported. In pursuance of that agreement, the plaintiff, on February 9, 1885, at the request of the express company, executed, and the express company delivered to the defendant, the following agreement:

“ Old Colony Railroad Company. Boston, February 9, 1885. Whereas, under the rules of the Old Colony Railroad Company, passengers are not allowed to ride in the baggage cars of any trains, but the undersigned, holder of a season ticket, being engaged in the express business, is desirous of riding in such car for the more convenient despatch of his business as an expressman, it is understood and agreed that, in consideration of said company allowing him to ride in baggage cars on its trains, the undersigned will assume all risk of accidents and injuries resulting therefrom, and will hold said company free and discharged

from all claims and demands in any way growing out of any injuries received by him while so riding."

The agreement was sent to the plaintiff, with a letter from the superintendent of the express company asking him to sign it, and he signed it unwillingly, but did so because he understood that, if he did not, the railroad company would demand that he should be removed by the express company from his position as messenger. The defendant thereupon issued to the express company, for the plaintiff, a season ticket, which contained a provision that "it is not to be used on express business, and if so used will be forfeited," and differed from those issued to passengers generally in having stamped upon it this provision: "The holder of this ticket, having released the company from all liability, will be permitted to ride in the baggage car. J. Sprague, Jr., General Passenger Agent."

It was contrary to the rules of the railroad company to permit passengers to ride in baggage cars and express cars, and this provision was stamped upon the ticket for the purpose of showing to conductors that the person holding that ticket had released the company from liability, and therefore the rule need not be enforced in this case. While the plaintiff was riding in a baggage car, as an express messenger, under the above arrangement with the express company and contract signed by himself, and holding a ticket thus stamped, he received his injuries. The following regulation, signed by the defendant's general manager, was posted and enforced in the baggage car in which the plaintiff rode while in the employment of the express company as a messenger on the defendant's road, and at the time of the accident:

"Old Colony Railroad. Notice. No passenger will be allowed to ride in the baggage car of any train unless he has signed a release discharging the company from all claims and demands in any way growing out of any accident or injuries while riding in such car. Conductors and baggage-masters will be particular at all times not to permit any passenger to ride in the baggage car without the special permit, which will be stamped on the tickets of those who have complied with the regulations. This rule must be strictly enforced."

Two other express companies — one a local company which had no messenger in charge of its express matter, the same being

cared for by the messengers of the other companies, and the other the Vermont and Canada Express, which had a messenger riding in the baggage car under this regulation — were doing business over that portion of the defendant's road during the year 1885, and at the time of the accident. The express business over the defendant's railroad was carried on in the baggage car attached to its passenger train, by messengers riding therein, under agreements and upon tickets like that signed and held by the plaintiff.

The defendant contended that, upon the above facts, the plaintiff could not recover, and asked the judge to rule: "1. The agreement and release is a bar to the plaintiff's recovery. 2. If the release is void and not a bar, the plaintiff was, as a passenger, guilty of contributory negligence by being in the baggage car, contrary to the known reasonable regulation that passengers were not allowed to ride in the baggage car. 3. On the whole evidence, the plaintiff is not entitled to recover, and the verdict should be for the defendant."

The judge declined to rule as requested, but ruled that the plaintiff was entitled to recover, notwithstanding the regulation and agreement, and submitted the case to the jury upon the question of damages only. The jury returned a verdict for the plaintiff for \$10,000; and the defendant alleged exceptions.

S. C. Darling, for the plaintiff.

1. If the plaintiff was a passenger for hire, the question is, whether a railroad company carrying passengers for hire can lawfully require a release from them of all claim for injuries received through its negligence or that of its servants, if the terms are reasonable. A stipulation against negligence of the carrier has been allowed in cases where a reasonable option of rates, graduated upon the degree of liability, has been offered the shipper. As to the law in England, see *Macauley v. Furness Railway*, 42 L. J. Q. B. 4; *Hall v. North Eastern Railway*, 44 L. J. Q. B. 164; *Gallin v. London & North Western Railway*, 44 L. J. Q. B. 89. In this Commonwealth, the exact question has never been decided, but the decisions seem to point to the same judgment as in *Railroad Co. v. Lockwood*, 17 Wall. 357, which decided that a railroad company could not require such

a release. *Todd v. Old Colony & Fall River Railroad*, 3 Allen, 18. *Squire v. New York Central Railroad*, 98 Mass. 239. *Medfield School District v. Boston, Hartford, & Erie Railroad*, 102 Mass. 552. *Commonwealth v. Vermont & Massachusetts Railroad*, 103 Mass. 7. *Graves v. Lake Shore & Michigan Southern Railroad*, 137 Mass. 33. *Hill v. Boston, Hoosac Tunnel, & Western Railroad*, 144 Mass. 284. See *Philadelphia & Reading Railroad v. Derby*, 14 How. 468, 483; *Steamboat New World v. King*, 16 How. 469; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 383, 384; *Sager v. Portsmouth Railroad*, 31 Maine, 228; *Wells v. Steam Navigation Co.* 8 N. Y. 375. Releases or agreements to exempt common carriers from the consequences of their own negligence, or that of their servants, have been held to be void in the following passenger cases, chiefly upon the ground of public policy: *Flinn v. Philadelphia, Wilmington, & Baltimore Railroad*, 1 Houston, 469; *Pennsylvania Railroad v. Henderson*, 51 Penn. St. 315; *Jacobus v. St. Paul & Chicago Railway*, 20 Minn. 125; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Rose v. Des Moines Valley Railroad*, 39 Iowa, 246. See *Smith v. New York Central Railroad*, 24 N. Y. 222. See also Redf. Railways (5th ed.) § 178, par. 5.

2. The agreement and release are without consideration, because, under the Pub. Sts. c. 112, § 188, the defendant was under legal obligation to permit the plaintiff to ride in the baggage car as an express messenger. The relation of railroad corporations to express companies and their messengers is fully discussed in the *Express Cases*, 117 U. S. 1. In that case it was held that railroad companies need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing an express business upon their passenger trains. The St. of 1867, c. 339, now Pub. Sts. c. 112, § 188, is such a statute. Under that statute, railroad corporations must either do the express business themselves, or allow express companies to carry it on over their roads. See *Sargent v. Boston & Lowell Railroad*, 115 Mass. 416; *McDuffee v. Portland & Rochester Railroad*, 52 N. H. 430, 439; *New England Express Co. v. Maine Central Railroad*, 57 Maine, 188.

3. The agreement and release are unreasonable, because the defendant owes the same duty to one season ticket holder that

it does to another. Receiving the same compensation for carrying the plaintiff in the baggage car that it did for carrying every holder of a similar season ticket in the passenger car, the duty as to careful carriage ought to be the same. The plaintiff had no option. If he failed to sign the release, no reasonable alternative rate, based upon the alleged increased risk of allowing him to ride in the baggage car as an express messenger, was offered him by the defendant. No increase of carefulness is exacted of railroads as to carriage in the baggage car, beyond what they must exercise in every case with reference to passengers in the passenger cars of the same train; no extra burden of care or responsibility is therefore imposed upon them in the case of an express messenger. See *Peek v. North Staffordshire Railway*, 32 L. J. Q. B. 241, followed in *Ashenden v. London, Brighton, & South Coast Railway*, 5 Ex. D. 190; *Allday v. Great Western Railway*, 34 L. J. Q. B. 5; *Rooth v. North-Eastern Railway*, 36 L. J. Ex. 83.

4. It is denied that, if the release is void and not a bar, the plaintiff was, as a passenger, guilty of contributory negligence by being in the baggage car, contrary to the known reasonable regulation that passengers were not allowed to ride in the baggage car. The plaintiff, while undoubtedly a passenger for hire so far as right to transportation was concerned, was yet not one of that class of passengers who have been held guilty of contributory negligence in being in the baggage car at the time of a railroad accident, nor one of that class to whom the notice was directed which forbade passengers riding in the baggage car. The notice was clearly intended for passengers who were passengers for transportation only.

5. In order to maintain his case, the plaintiff need only prove one proposition, to wit, that he was rightfully in the baggage car at the time of the accident. The defendant's negligence is conceded as well as the plaintiff's due care, if he was rightfully in the baggage car. The plaintiff was rightfully there under the provisions of the Pub. Sts. c. 112, § 188; or, if not, (as the express business was part of the defendant's public duty, and as it was not at the time of the accident discharging it by its own agents,) because it was necessary that somebody should be in the car to perform the duties of a messenger.

J. H. Benton, Jr., for the defendant.

1. The baggage car is a place of danger, as matter of law, and it was the duty of the defendant to make and enforce a regulation that passengers should not ride in it. *Pennsylvania Railroad v. Langdon*, 92 Penn. St. 21. While the question has not been raised in this Commonwealth whether the baggage car is, as matter of law, a known place of danger, so that a passenger cannot recover for an injury received while riding in it, the decisions cover this proposition. *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429, and cases cited. It is clear that the company incurred a greater risk in carrying the plaintiff in the baggage car than in the passenger car; that, as a passenger, he had no right to be carried in the baggage car; and that it was only because of this contract to take his own risk that the company carried him there. An agreement under which the plaintiff was carried in a place where he would not otherwise have had a right to be carried, was a reasonable and proper agreement. The question whether a carrier can exempt itself from the consequences of its own negligence is not settled in this Commonwealth. *Graves v. Lake Shore & Michigan Southern Railroad*, 137 Mass. 33. *Railroad Co. v. Lockwood*, 17 Wall. 357, does not deal with the proposition upon which he must stand in this case, if at all, that a common carrier cannot by express agreement limit its liability for the negligence of its servants and agents in performing a contract to transport in a different manner from that in which it is bound to transport; but simply with the general question, whether a railroad company carrying passengers for hire in the usual manner can lawfully stipulate not to be answerable for its own negligence or that of its servants as to such carriage.

2. The plaintiff says, that although he had no right in the baggage car as a passenger, still he had a right as an express messenger to ride in the baggage car without condition; and that when the defendant refused to carry him there unless he would take the risk of being so carried, it attempted to put off its public duties as a common carrier as much as it would have done if it had refused to carry him as a passenger in the passenger car without a similar agreement. The plaintiff's

contention, therefore, must rest wholly upon the effect which should be given to the Pub. Sts. c. 112, § 188. The plaintiff contends that it does compel railroads to receive into the baggage cars of their passenger trains all persons and companies who desire to be common carriers of other persons, and to transact, in the case of express companies, an independent business of transportation as common carriers in the baggage cars attached to passenger trains of railroads. The defendant contends that this statute is simply declaratory of the common law, except so far as that may have been modified by *Fitchburg Railroad v. Gage*, 12 Gray, 393, and cases following that decision. If a railroad company becomes a common carrier of one express company or transportation company, it may under this statute be bound to become a common carrier of other express companies, but the statute does not impose upon a railroad company the duty of becoming a common carrier of all other independent common carriers. The effect that would be produced by a statute making railroads common carriers of all other common carriers, is forcibly set forth in the *Express Cases*, 117 U. S. 1, 23, 24. See *McDuffee v. Portland & Rochester Railroad*, 52 N. H. 430, 457.

3. The regulation which excluded the plaintiff as a passenger from the baggage car was reasonable, and the contract under which he was obliged to take the risk of riding there, if he chose, for the more convenient despatch of his business, was a reasonable contract, which the defendant not only had a right to make, but ought to have made. Such contracts have always been sustained by the English courts, even under the Railway and Canal Traffic Act of 1854, which provided that no special contract limiting the carrier's liability as to the carriage of property should be binding, unless adjudged by the court to be just and reasonable. The rule established by that statute is the proper one to be applied in this country, in the absence of any statute. *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 342. A common carrier may now limit its liability for negligence in England by any special contract, and the court will not pass upon the question whether that contract is reasonable or unreasonable. See *Simons v. Great Western Railway*, 18 C. B. 805; *London & North Western Railway v. Dunham*, 18

C. B. 826; *White v. Great Western Railway*, 2 C. B. (N. S.) 7; *Pardington v. South Wales Railroad*, 1 H. & N. 392; *M'Manus v. Lancashire & Yorkshire Railway*, 4 H. & N. 327; *Garton v. Bristol & Exeter Railway*, 1 B. & S. 112; *Peek v. North Staffordshire Railway*, 10 H. L. Cas. 473; *Allday v. Great Western Railway*, 5 B. & S. 903; *Doolan v. Midland Railway*, 2 App. Cas. 792; *Manchester Railroad v. Brown*, 8 App. Cas. 703; *Great Western Railway v. McCarthy*, 12 App. Cas. 218. The plaintiff had an option to be carried in the place where the defendant, as a common carrier, was bound to carry him under its regulations without making the contract, or, by making the contract, to be carried in the baggage car, where the defendant was not bound to carry him. Having exercised his option, and received the benefit, he cannot now repudiate the contract, and recover as though it had not been made. Especially is this so in view of the fact that, if he had been carried in the passenger car, where alone the defendant was, as a common carrier, bound to carry him, he would not have been injured, for no persons riding in the passenger cars were injured.

4. Can a contract, limiting the liability of a common carrier for negligence in the performance of its contract to carry, — and “in the course of time such negligence is inevitable,” *Graves v. Lake Shore & Michigan Southern Railroad*, 137 Mass. 33, — which does not amount to an abandonment of the contract, and to a wilful or fraudulent injury to the person or property carried, be properly said to be contrary to any rule of public policy which the court is bound to enforce? Doubtful matters of public policy should be left to the Legislature to settle, for the Legislature alone has the means of bringing before it all the considerations which bear on the question. *Richardson v. Mellish*, 2 Bing. 229, 242. It is, to say the least, a matter of doubt whether the right which every person has to make voluntary contracts upon considerations satisfactory to him should be taken away as to common carriers, upon the ground that the making of them will tend to make the carrier less careful in the discharge of its duties towards others. See *Michigan Central Railroad v. Hale*, 6 Mich. 243, 263; *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 485; *Smith v. New York Central Railroad*, 24 N. Y. 222; *Perkins v. New York Central Railroad*, 24

N. Y. 196; *Carr v. Lancashire & Yorkshire Railway*, 7 Exch. 707. If contracts which by limiting the liability of a carrier for its negligence tend to induce it to be negligent in the performance of its duty to carry others without negligence, and are thus injurious to others, are therefore void as against public policy, although they may be just and reasonable as between the carrier and the person with whom they are made, the question still remains whether a contract of limitation does in any particular case have that effect. Not every contract which relieves the carrier from any part of the responsibility which will arise in case it is negligent, is void. *Graves v. Lake Shore & Michigan Southern Railroad*, 137 Mass. 33. *Hart v. Pennsylvania Railroad*, 112 U. S. 331. It is absurd to say that a contract by which the defendant limited its liability for negligence in the carriage of the two express messengers riding in its baggage car tended to induce it to be careless in the carriage of the other persons upon the passenger train. A condition in a free pass exempting the carrier from liability, which it is obvious amounts to a contract on the part of the holder limiting the liability of the carrier for negligence, is by the great weight of authority held valid. *Griswold v. New York & New England Railroad*, 53 Conn. 371, and cases cited. See *Wells v. New York Central Railroad*, 24 N. Y. 181.

W. ALLEN, J. The rules of the defendant prohibited passengers from riding in baggage cars, and the plaintiff had no right as a passenger to ride where he was riding at the time he was injured. He was there under a special contract, by which, in consideration that the defendant would allow him to ride in the baggage cars, he assumed all risk of accident and injuries resulting therefrom, and agreed to hold the defendant free and discharged from all claims and demands growing out of any injury received by him while so riding. The parties plainly intended to include injuries resulting from the negligence of the defendant's servants.

We need not consider whether the contract would be construed or held to include injuries to which riding in the baggage car did not contribute. There was evidence tending to show that the plaintiff would not have been injured had he been in a passenger car, and that his presence in the baggage car

directly contributed to the injury. The ruling of the court ordering a verdict for the plaintiff was a ruling that the plaintiff was entitled to recover for an injury caused by the negligence of the defendant's servants, although his riding in the baggage car contributed to the injury. In considering the correctness of this ruling, the contract of the plaintiff must be taken to have been, that he would assume the risk of injury from the negligence of the defendant's servants to which his riding in the baggage car under the permission given by the defendant should contribute. The objection is, that the contract is void, as without consideration, as unreasonable, and as against public policy. We see no objection to the contract as construed and applied in this case.

It was the duty of the defendant as a carrier of passengers to transport persons over its road on their paying the established fare, and to see that its servants used due care to secure the safety of its passengers. It was its duty to give to persons paying the established rates tickets which would be evidence of their right to carriage, and of the defendant's obligation to carry them with due care. The defendant was ready to do this, and did sell to the plaintiff a season ticket which gave to him all the rights of a passenger. The contract in question was made to give him a right which did not belong to him as a passenger. The plaintiff, having the rights of a passenger, desired to ride in the baggage car. The regulations of the defendant, as well as personal prudence, forbade him to ride there, and, if he had attempted to do so, he not only would have assumed all the risks of injuries resulting therefrom, but would have been liable to be expelled from the car by the defendant.

It is difficult to see upon what ground it can be contended that an agreement of the plaintiff, that, in consideration that the defendant would permit him to ride in the baggage car, he would assume all risk of injuries resulting therefrom, is unreasonable or illegal. The defendant was under no obligation to give the permission, and the effect of the plaintiff's agreement was only that the liability of the defendant should not be increased by the permission that the plaintiff, if he should be injured in consequence of being in the baggage car, should not be entitled to recover damages of the defendant, on the ground that he was

there by its permission. The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car.

The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers by contracts with their customers or passengers in regard to such duties, does not arise under this contract as construed in this case. See *Railroad Co. v. Lockwood*, 17 Wall. 357; *Griswold v. New York & New England Railroad*, 53 Conn. 371. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. The contract by which he obtained what he sought did not impair his rights as a passenger, and he was under no compulsion to enter into it.

It is contended that the plaintiff, as the servant of the express company, had a right by statute to ride in the baggage car, and that therefore the case comes within the decisions that it is unreasonable and against public policy for a person, as a condition of his becoming a passenger on a railroad, to agree that he will take the risk of the negligence of the servants of the railroad in transporting him. The express company is a common carrier, and it is not contended that a railroad corporation is bound to transport in the baggage cars of its passenger trains the merchandise and servants of another common carrier, unless required to do so by some statute. See *Sargent v. Boston & Lowell Railroad*, 115 Mass. 416; *Express Cases*, 117 U. S. 1.

The statute relied on is c. 112, § 188, of the Public Statutes, which is in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and for the use of its depot and other buildings

and grounds; and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." The statute cannot be construed to require railroad corporations to discriminate in favor of express companies, and to carry their merchandise and messengers in the baggage cars of passenger trains on reasonable terms, equally favorable to all express companies. If that were the meaning of the statute, no questions as to the equality of the terms given to the plaintiff or the company he represented would arise. The same contract was required of all other express messengers who rode in baggage cars. The only question that would arise is whether the terms granted were reasonable.

The fact that the plaintiff was riding in the baggage car as an express messenger in charge of merchandise which was being transported there, shows more clearly that the contract by the express company and the plaintiff was not unreasonable or against public policy. He was there as a servant engaged with the servants of the railroad corporation in the service of transportation on the road. His duties were substantially the same as those of the baggage-master in the same car; the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggage-master, and would have been the same had he been paid by the corporation instead of by the express company. Had the railroad done the express business, the messenger would have been held by law to have assumed the risk of the negligence of the servants of the railroad.

It does not seem that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger in performing his duties should take the same risk of injury from the negligence of the servants of the railroad engaged in the transportation that he would take if employed by the railroad to perform the same duties, would be void as unreasonable or as against public policy. When we add the considerations, that the plaintiff was a passenger whose rights as such were not impaired by the agreement, and that the agreement was to assume the risk of injuries

resulting from his riding in baggage cars, in consideration of being permitted to ride there to conduct the express business, it seems clear that the contract is a valid and sufficient defence to an action against the defendant for injuries resulting from the negligence of the defendant's servants, to which the fact that the plaintiff was riding in the baggage car under the agreement contributed.

Exceptions sustained.

ATLANTIC COTTON MILLS vs. INDIAN ORCHARD MILLS.

Suffolk. March 21, 22, 1888. — June 20, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Corporations — Common Agent — Knowledge — Notice — Payment — Negligence.

The common treasurer of two corporations, to make good his deficit to one, drew checks upon the other payable to the order of the first, by which the money was drawn and used, no other officer of either knowing the facts. He charged himself upon a private memorandum with a part of the money, and falsely entered the remainder upon the books of the corporation upon which the checks were drawn as loans to a third person, from whom it made an attempt to collect it. *Held*, that the corporation using the money was affected with his knowledge, and the transaction did not amount to a payment of the deficit; and that the other corporation was not guilty of such negligence as to preclude it from recovering back the money.

CONTRACT to recover the balance of a mutual account between the parties. The defendant filed a declaration in set-off, to diminish such balance. Trial in this court, without a jury, before *Devens, J.*, who reported the case for the consideration of the full court. The case was submitted upon an auditor's report as an agreed statement of facts, in substance as follows.

The two corporations had had business relations with one another for many years, during which the respective treasurers had lent the funds of each to the other by means of the checks of one in favor of the other. The directors of each corporation had never by vote expressly authorized such loans, but the facts were known to them, and the loans impliedly sanctioned by them. William Gray, Jr., who had become the treasurer of

both corporations, continued this practice of mutual lending; and the plaintiff's claim was for a balance of \$365,500 upon this loan account, as appeared by its books. The defendant contended that it was entitled to recover upon its declaration in set-off the sum of \$219,114.48, and therefore owed the plaintiff only \$146,385.52, and this was the question at issue.

Besides the legitimate dealings between the two companies, all of which were conducted and recorded under Gray's orders, Gray took moneys from both, from 1881 to August 14, 1886, for his own use. Every six months, when the accounts of either company were to be made up, he transferred to that company from the treasury of the other the amount necessary to make his cash account good. These transfers were made by checks of the one mill to the order of the other, made in precisely the same manner as the legitimate transfers of cash from one to the other, and entered in the same manner on the check and stub books of both companies. The transfers were not made by single checks for the amount of the deficiency, but generally by several checks running over a considerable period, and undistinguished from the legitimate payments by one mill to the other during such period, except by the failure to post them from the check-books to the cash-book and ledger.

The mode of committing and concealing the frauds was, to some extent, different in the two cases; but evidence of every transaction was preserved, and every dollar taken could be accounted for. The facts appear upon the check-books of both companies, in which the stubs show that the money taken by Gray was taken by checks to his own order, and the money transferred from one company to the other was always by checks payable to the order of the company receiving it. There were, besides, private memoranda, kept by the book-keepers of the two companies, which had been preserved.

Each company was in the habit of appointing annually a committee of stockholders to examine the accounts, with authority to employ an expert, the same expert being employed by both, and his examinations being adopted. He examined the accounts usually on or about the days when they were made up, but occasionally at other times, and the committees reported to their respective companies at the successive annual meetings. No

officer of either company, excepting Gray, knew of his frauds. They were known to the book-keeper of each company, and upon the evidence, the private accounts were known to the expert, but he was not called as a witness. All the entries on the check-books and on the private memoranda were made by the respective book-keepers by order of Gray.

In the case of the Atlantic Cotton Mills, Gray would take money from that corporation and enter it on his memorandum, no other entry being made except on the stubs of the check-books. Upon this memorandum he would charge himself with all these sums, and would credit himself with payments which he, from time to time, made by deposits to the credit of the companies, and with the amount of his salary. The memorandum was treated as cash, and the discrepancy could not be discovered except by a comparison of the cash on deposit with the amount required by the cash-book, or of the cash-book with the check-books, which the plaintiff contended should have been done. The accounts of this company were made up to the fifth days of June and December in each year, and before those dates Gray would cause to be transferred to this company, from the cash of the defendant, from time to time, checks for various sums, amounting in all to the deficit in the plaintiff's cash as shown on his private memorandum. The plaintiff contended that the amounts transferred by Gray from one company to the other were so transferred for the purpose of paying his indebtedness to the company receiving them; but the auditor found that they were made for the purpose of concealing his deficit.

In the case of the Indian Orchard Mills, Gray charged a part of his thefts to certain persons, as if they had borrowed those sums, and kept an account of the remainder upon a memorandum like that kept with the plaintiff. These loan accounts, excepting Gray's, were fictitious. Gray held notes of these persons, and placed them in that part of the safe, common to the two mills, where the books and papers of the Indian Orchard Mills were kept. These notes did not represent value received from, nor any dealings with, the Indian Orchard Mills, but only Gray's defalcations.

On September 27, 1886, the Indian Orchard Mills brought an action, which is still pending, against one of these persons on

a note for \$2,000 given to the order of Gray, who indorsed and deposited it in that part of the common safe where the papers of the Indian Orchard Mills were kept, and at the same time took a check of the defendant to his own order for \$2,000, and appropriated the same to his own use, entering it as a loan to the maker of the note. The amounts supposed to be lent to such persons were entered in the general loan account on the ledger, and so into the monthly trial balances, and into the annual State returns; but the names of the supposed borrowers did not appear there, nor in the ledger, and were not known to the directors. All of these alleged loans, except a portion of that to one person, were entered on the cash-book and journal of the Indian Orchard Mills with the name of the alleged borrower, and were also carried into the "loan account" in the ledger, where, however, the individual names of the alleged borrowers did not appear, it not being the practice of the book-keepers to insert in that account the names of the borrowers. Large transfers to the loan account were thus made from time to time from Gray's private memoranda, as a mode of concealing his cash deficit.

A comparison of the ledger with the cash-book and journal would have disclosed these accounts. These alleged loans were entered on the books in the same way in which all loans were entered, no separate account being kept of such loans. All loans were credited to cash and charged to the loan account on the ledger. The accounts of the Indian Orchard Mills were made up and examined on the last Saturdays of April and October; and the deficiency of cash was made good by checks of the Atlantic Cotton Mills made to the order and deposited to the credit of the Indian Orchard Mills.

The net amount taken by Gray for his own use from the plaintiff was \$265,786.95, and from the defendant, \$267,535.62. The only question is, how the account between them should be made up.

When the frauds were exposed, on August 14, 1886, the transfers of cash from the defendant to the plaintiff by checks so made to conceal the truth were larger than from the plaintiff to the defendant by the sum of \$219,114.48. This balance was, in a certain sense, accidental; depending on the fact that the frauds were discovered about six weeks after the Atlantic Cotton

Mills had made up its semiannual account, at which time their cash was made good from the defendant's treasury, and before Gray had gone far in preparing for the next settlement with the defendant by transferring to its credit checks of the plaintiff, having then transferred about \$50,000. From the mode in which the transfers of cash were made, if each company was charged with the checks transferred to it from the other, the exact amount of money taken by Gray from each company would be lost by each; and this was the mode of accounting contended for by the defendant.

The plaintiff contended that the transfers of checks from one company to the other were, in fact and law, payments by Gray to an innocent creditor without notice, and therefore could not be reclaimed; that the losses must be borne as they stood at the time of the discovery of the frauds; or, which reaches the same result, that the loan accounts between the two companies as they appeared on their ledgers should be taken, the claims in set-off being disallowed.

The auditor ruled, as matter of law, that the account should be made up in the mode asked for by the defendant, and that, consequently, the defendant owed the plaintiff \$146,385.52, and interest.

J. G. Abbott & R. M. Morse, Jr., (C. S. Hamlin with them,) for the plaintiff.

W. G. Russell & G. Putnam, for the defendant.

C. ALLEN, J. The only question in this case is whether the defendant is entitled to be allowed, by way of set-off, for certain checks amounting to the sum of \$219,114.48, which were fraudulently drawn by Gray on account of the defendant in favor of the plaintiff, as shown in the auditor's report, and transferred to and used for the benefit of the plaintiff.

There is no doubt that there has been an unauthorized transfer of property to this amount from the treasury of the defendant corporation to the treasury of the plaintiff corporation, without any consideration as between the two corporations. It was a fraudulent transfer by Gray, who was the treasurer of both corporations. If this were all there was to it, it would be quite plain that the plaintiff could not in good conscience retain the money. The doctrine is universal, and prevails alike at law and

in equity, that a person, though innocent, cannot avail himself of an advantage obtained by the fraud of another, unless there is some consideration moving from himself. It was long ago declared by Lord Mansfield, that, "although a third person shall not be punished for the fraud of another, he shall not avail himself of it. There is no case in the law where that can be done." *Robson v. Calze*, 1 Doug. 228. *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, 545. *Olmsted v. Hotailing*, 1 Hill, 317. *Udell v. Atherton*, 7 H. & N. 171. *Huguenin v. Baseley*, 14 Ves. 273. *Scholefield v. Templer*, 4 DeG. & J. 429. *Topham v. Duke of Portland*, 1 DeG. J. & S. 517, 569. *Russell v. Jackson*, 10 Hare, 204, 212.

The ground on which the plaintiff asserts a right to retain the money is, that Gray had embezzled its funds, as well as the funds of the defendant, to a large amount, and that it is entitled to apply the money thus received from him to reduce his indebtedness for such embezzlements, and treat the same as a payment *pro tanto*; that from the nature of the transaction, the law stamps it as a payment; and that thus the plaintiff is a holder of the funds for a valuable consideration. There is no doubt that a thief may use stolen money, or stolen negotiable securities before their maturity, to pay his debts; and in such case an innocent creditor may retain the payment. But this doctrine is inapplicable to the present case, for two reasons: in the first place, under the circumstances disclosed in the auditor's report, the plaintiff cannot be considered as an innocent creditor, that is, a creditor without notice; and, moreover, the transaction did not amount to payment.

It is true, that no officer of the plaintiff besides Gray knew of the fraudulent origin of these checks; but in the very transaction of receiving them, the plaintiff was represented by Gray, and by him alone, and is bound by his knowledge. It is the same as if the plaintiff's directors had received the checks, knowing what he knew. For the purpose of accepting the checks, Gray stood in the place of the plaintiff, and was the plaintiff. It is quite immaterial, in reference to this question, in what manner or by what officers of the corporation the funds were afterwards used. The important consideration is, how the plaintiff became possessed of the money; and it is apparent that it was through

the act of no other person than of Gray himself. It is not as if Gray had stolen the money, and then called the directors of the plaintiff corporation together and informed them of his indebtedness and of his desire to make a payment on account, and had then paid over to them the money as money coming from himself, and they had received it without knowledge or suspicion that it had been stolen, and given him credit for it as part payment. There was no transaction whatever between Gray and the plaintiff, in respect to the transfer of this money, in which the plaintiff was represented either in whole or in part by any other person than by Gray; and therefore, even though the transfer to the plaintiff had been made in bank bills or in gold coin, (which it was not,) the plaintiff must be deemed to have had knowledge of the true ownership, because in receiving the funds it acted solely through Gray's agency. It must be deemed to have known what he knew; and it cannot retain the benefit of his act, without accepting the consequences of his knowledge. The plaintiff cannot obtain greater rights from his act than if it did the thing itself, knowing what he knew.

Such is the doctrine either expressly declared or necessarily involved in numerous adjudged cases. The leading case in this Commonwealth is *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, where there was the semblance of an accounting between the guilty agent and other officers of the bank which received the money, but it was held that there was no real accounting, and the general principle was held to be applicable. That case was followed by *Skinner v. Merchants' Bank*, 4 Allen, 290, where the facts were similar.

In *Loring v. Brodie*, 134 Mass. 453, 468, one of the numerous questions discussed arose upon the following alleged facts. Brodie as trustee held certain trust funds, and as an individual owed the Merchants' Bank. Fuller was cashier of the bank, and was also the agent of Brodie. As such agent, Fuller was in possession of certain moneys belonging to Brodie's trust funds, and wrongfully paid the same, in discharge of Brodie's private indebtedness to the bank, either to himself as cashier of the bank, or to the teller, who was under him. On a bill in equity by the *cestuis que trust*, it was declared by the court, that, if these facts were proved, the bank must restore the money thus

paid; that Fuller's knowledge was the knowledge of the bank; and that the bank could not receive the trust funds, except charged with the knowledge which the cashier had, and subject to the responsibilities which that involved. But the court found that the proof was not sufficient to establish the facts as charged. And in another part of the same case, on page 458, a similar application of the same general doctrine was made, in holding the bank chargeable with Fuller's knowledge that certain securities pledged by Fuller as Brodie's agent to the bank, and received by Fuller as cashier, were trust funds. The court say: "If Fuller was the instrument of Brodie in committing a fraud on the bank, by unlawfully transferring to it the securities of another, whether he concealed this fact or not, the bank could not take the securities from his hands, or hold them in its custody, except with the knowledge he had. The only authority the bank could have to hold or sell them was under the contract made by or through Fuller, its cashier." See also *United States v. State Bank*, 96 U. S. 30; *State Bank v. United States*, 114 U. S. 401, 409.

The effect of knowledge is to put the plaintiff in the same position that it would be in if there were no pretence of a consideration moving from it. In order to entitle it to retain the defendant's funds, both elements must exist, — a good consideration, and the want of knowledge that the funds belonged to the defendant. Such want of knowledge cannot in the view of the law exist, where the party in the particular transaction is represented solely by one who has knowledge. The rule is general, that, if one who assumes to do an act which will be for the benefit of another, commits a fraud in so doing, and the person to whose benefit the fraud will enure seeks, after knowledge of the fraud, to avail himself of that act, and to retain the benefit of it, he must be held to adopt the whole act, fraud and all, and to be chargeable with the knowledge of it, so far at least as relates to his right to retain the benefit so secured. This rule is applied to preferences under insolvent or bankrupt laws, where fraudulent knowledge of the creditor's agent or attorney is imputed to the creditor, though he is personally innocent. *Bush v. Moore*, 133 Mass. 198, 200. *Rogers v. Palmer*, 102 U. S. 263. And for numerous other illustrations of the

chargeability of a principal with his agent's knowledge, reference may be made to the following cases: *National Security Bank v. Cushman*, 121 Mass. 490; *Suit v. Woodhall*, 113 Mass. 391; *Sartwell v. North*, 144 Mass. 188; *Moseley v. Hatch*, 108 Mass. 517; *The Distilled Spirits*, 11 Wall. 356; *Doggett v. Emerson*, 3 Story, 700, 735; *New Milford National Bank v. New Milford*, 36 Conn. 93; *Bank of United States v. Davis*, 2 Hill, 451, 464; *Bennett v. Judson*, 21 N. Y. 238; *Crans v. Hunter*, 28 N. Y. 389; *Glyn v. Baker*, 13 East, 509, 516; *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Boursot v. Savage*, L. R. 2 Eq. 134; *Rolland v. Hart*, L. R. 6 Ch. 678; *Espin v. Pemberton*, 3 DeG. & J. 547; *British & American Telegraph Co. v. Albion Bank*, L. R. 7 Ex. 119; *Bradley v. Riches*, 9 Ch. D. 189; *Blackburn v. Vigors*, 17 Q. B. D. 553, 559; *S. C.* on appeal, 12 App. Cas. 531, 537, 538.

We have preferred to put the decision of this point upon the broad ground, that, if the treasurer of a corporation is a defaulter, and his defalcation is as yet unknown and unsuspected, and he steals money from a third person and places it with the funds of the corporation in order to conceal and make good his defalcation, and the corporation uses the money as its own, no other officer knowing any of the facts, the corporation does not thereby acquire a good title to the money, as against the true owner, but the latter may maintain an action against the corporation to recover back the same. But it is also apparent that in the present case the decision might rest upon a narrower ground. The fraudulent transfers were made by checks of the defendant, payable to the order of the plaintiff, and these checks before being available must necessarily have been indorsed by the plaintiff, acting by some officer authorized to indorse checks payable to its order. If these checks therefore were taken by the plaintiff in payment of indebtedness of Gray, they carried notice upon their face that they were checks of the defendant, not payable to Gray's order, but to the order of the plaintiff. Now, assuming that Gray's transaction had been conducted with some other officers of the plaintiff, who represented that corporation, it is impossible to suppose that they could have accepted these checks in extinguishment of a known indebtedness of Gray to the plaintiff, without being put upon inquiry as to how he came

by the defendant's checks to so large an amount, made payable to the plaintiff, which he could apply upon his private account. *National Bank of North America v. Bangs*, 106 Mass. 441, 445, 446.

Many authorities have been referred to on behalf of the plaintiff, which show that an agent's knowledge is not in all cases to be imputed to the principal. As a general thing, they fall within some clear line of distinction from the present case. The most recent of these cases is *Innerarity v. Merchants' Bank*, 139 Mass. 332, in which Burgess, the fraudulent agent, did not represent the bank in the particular transaction in question, but he was on one side of the transaction as representing himself, and other officers of the bank were on the other side as representing the bank. Under such circumstances, his knowledge of his fraud was not imputed to the bank. That case did not present the question whether a principal can avail himself of the results of his agent's fraud without responsibility for the fraud. So in *Dillaway v. Butler*, 135 Mass. 479, where the facts are not very fully set forth, it sufficiently appears that, in determining to accept the fraudulent mortgage in question, the plaintiff acted for himself, and innocently, and the supposed agent, who was privy to the fraud and who advised him to take the mortgage, was not at that stage of the transaction his agent, but was acting in his own interest, and for the mortgagor, and what he did was not for the benefit of the plaintiff, but a fraud upon him. He was not a general agent or solicitor for the plaintiff, but his agency for the plaintiff was limited to completing a transaction which the plaintiff himself had determined to enter upon. In *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, the dissenting opinion goes upon the ground that the examination of the funds in the teller's custody was in fact an accounting by him, in which he on the one side represented himself as an accounting officer, and the examining officers on the other side represented the bank. This view of the facts did not prevail with a majority of the court, but the principle relied on, even in the dissenting opinion, is entirely consistent with our present decision; while the view of the facts taken by the majority of the court brought that case substantially under the same rule applicable to the present case.

The case of *Ingraham v. Maine Bank*, 13 Mass. 208, is still much relied on, notwithstanding the explanation given in *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, 553, 556, of the ground upon which that decision must rest. In that case, the cashier of the Maine Bank drew official checks as cashier, got the money upon them, and placed the money with the funds of the bank, without entering it upon the books; thus the bank received the money raised upon its own checks, which it was bound to pay, and it might well be said that this money was its own under these circumstances. Nobody could claim it by any prior title, unless it were the banks upon which the checks were drawn; and they, instead of seeking to reclaim the money, relied upon and collected the checks which they held. The statement by the court, that "the transaction cannot be distinguished from an actual payment from his own funds to supply the defalcation," does not imply that the bank could in such case have held the money, as against the true owner, if he had stolen it from some one else, or that in such case the money would have been its own for all purposes. If such were the necessary implication from the language used, to that extent the doctrine stated could not be supported.

In the case of *In re European Bank*, L. R. 5 Ch. 358, the decision was placed on the ground that the claim of the Oriental Commercial Bank to the bills in controversy, as having been purchased with their money, was an equity attaching to the bills, and that the Eastern Commercial Bank, having purchased them when overdue, took them subject to this equity. The question respecting which Lord Justice Giffard, in delivering judgment, expressed his opinion, that, under the peculiar circumstances disclosed, the Eastern Bank was not affected with notice through Pappa, its sole director, was not material in the decision of the case, and his opinion, whether vindicable or not, is not an authority. The case *In re Marseilles Railway Co.* L. R. 7 Ch. 161, stands upon the same ground as *Innerarity v. Merchants' Bank*, *ubi supra*.

There is also a class of cases, which perhaps embraces the case of *In re European Bank*, *ubi supra*, where the act of the assumed agent is not for the benefit of his principal, but where, on the contrary, the agent forms a plan to cheat his principal,

and it is held that in that act he does not bear the character of agent, although his position as agent may enable him to carry out his plan. If an agent misuses funds of his principal which are in his hands, and devotes them to private purposes of his own, that is not an act of agency; so if he palms off poor securities of his own upon his absent principal, he conducting both sides of the transaction, it cannot be said in a proper sense that in such transaction he represents his principal. The principal is unrepresented. The agent cheats his principal. An embezzler does not represent his principal while in the act of stealing from him; although there is no one else to supervise the transfer of the property. Such cases are *Cave v. Cave*, 15 Ch. D. 639; *Kettlewell v. Watson*, 21 Ch. D. 685; *DeKay v. Hackensack Water Co.* 11 Stew. (N. J.) 158; *Davis Co. v. Davis Co.* 20 Fed. Rep. 699. They serve to illustrate the position of Gray towards the defendant in drawing the checks in controversy, but do not show that the plaintiff can retain the benefit of them without being chargeable with the knowledge which he possessed.

There is another class of cases where the same person has been trustee of two different funds, and has fraudulently transferred securities from one trust fund to the other. But in each case of this class which has been cited, there has been something in the nature of an accounting, and the trust fund which has received and has been held entitled to retain the benefit has been partly or wholly represented either by the *cestuis que trust*, or by an innocent trustee representing them. *Thorndike v. Hunt*, 3 DeG. & J. 563. *Taylor v. Blakelock*, 32 Ch. D. 560. *Case v. James*, 29 Beav. 512; *S. C.* on appeal, 3 DeG. F. & J. 256. In the last case, the final decision was put specially upon the ground that the surviving trustee himself, who was the sole plaintiff, and sought to follow the trust funds, had been guilty of a breach of trust in wrongfully consenting to a transfer, and that it did not appear that any *cestuis que trust* were interested in the proceeding, and that the trustee himself had no equity for his own benefit to follow the funds.

There is another class of cases, which have been cited for the plaintiff, which rest upon the ground that money, or negotiable securities, transferred to a third person, who receives them

innocently as property of the person from whom they come, for a valuable consideration, cannot be followed by the true owner; and the same rule extends to such property received by a firm from one of its members. *Lime Rock Bank v. Plimpton*, 17 Pick. 159. *Greenfield School District v. First National Bank*, 102 Mass. 174. *Thacher v. Pray*, 113 Mass. 291. *Ex parte Apsey*, 3 Bro. C. C. 265. *Jaques v. Marquand*, 6 Cowen, 497. *Dunlap v. Limes*, 49 Iowa, 177. These cases do not touch the principle upon which the present decision rests.

Thus far the discussion has proceeded upon the assumption, that even if the transfer of the defendant's property to the plaintiff were intended as a payment on account of Gray's indebtedness to the plaintiff, yet the plaintiff would not be entitled to hold the same, on the ground that it would be chargeable with Gray's knowledge of the source from which the money came. But it is equally clear, that the transfer cannot be considered as a payment by Gray to the plaintiff, because it was not so understood or intended by either party. There was no accounting between them. Nobody on the part of the plaintiff called Gray to any account, or knew that he was accounting, or that he was indebted to the plaintiff, or that these funds had come into the plaintiff's possession, or that they had come from Gray. Nobody knew any of these things except Gray himself. Nobody but Gray could possibly have intended that the transaction should amount to a payment, and his intention, if entertained, was ineffectual, because of his fraud. It is not necessary to deny or doubt that Gray might secretly transfer to the treasury of the corporation money or property of his own, and thus, if the same should be kept, extinguish an indebtedness arising from a former embezzlement. There would be nothing fraudulent in the act of such a transfer; and the corporation, being lawfully in possession of the money or property, might properly keep it. But where he undertook in this manner to make a payment by secretly transferring the property of a third person, the act cannot take effect as a payment, because it was not received as such by any person acting on behalf of the plaintiff. There was not even the semblance of an accounting. And under these circumstances, if the plaintiff would adopt the intention to make it a payment, it must also adopt the fraud. It

cannot adopt so much of Gray's act as was beneficial, and reject the rest. As Lord Kenyon said, in *Smith v. Hodson*, 4 T. R. 211, it cannot blow hot and cold. This ground also is fully covered by the decisions in *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, 547-553, and in *Skinner v. Merchants' Bank*, 4 Allen, 290.

It has been further suggested on the part of the plaintiff, that there was such a degree of negligence on the part of the defendant as ought to preclude it from maintaining its claim to the funds in controversy. In respect to this, it is sufficient to say that we see no such negligence as ought to have the effect to deprive it of its property.

The fact that Gray, upon a private memorandum, charged himself with the sums fraudulently withdrawn by him is immaterial. This act was unauthorized, and the defendant is not bound by it. Entering it in this manner did not make the transaction a loan from the defendant to Gray. It was none the less a fraudulent taking. The substantial rights of the parties are not affected by the methods of book-keeping adopted by him to conceal his frauds, or by entries made upon private memoranda for the purpose of keeping an account of them. Nor can the plaintiff avoid liability for money which it received without consideration, by showing that Gray fraudulently entered the same upon the defendant's books as loans to other persons, and that the defendant has endeavored to collect the same from those persons. The plaintiff was not misled, and gained no rights thereby. *Commonwealth v. Reading Savings Bank*, 137 Mass. 431. *Holden v. Hoyt*, 134 Mass. 181.

The result is, that judgment should be entered according to the report of the auditor.

So ordered.

WILLIAM G. RUSSELL & others vs. JOHN B. PAGE & others.

Suffolk. March 8, 1888. — June 21, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Arbitrators — Rule of Court — Fees — Assignment — Recovery in
Referees' Name.*

Referees under a rule of court may, upon the acceptance of their award, recover their reasonable fees from the parties to the submission.

If one party pays the whole of such fees, and takes an assignment of the referees' claim, he may recover one half thereof from the other party, and, if no objection is made, he may maintain his action in the name of the referees.

CONTRACT to recover the fees of arbitrators under a rule of court. Trial in the Superior Court, without a jury, before *Hammond*, J., who found for the plaintiffs, and reported the case for the determination of this court, as follows.

The plaintiffs were referees appointed upon the agreement in writing of the parties, under a rule of court, on a flowage complaint, under the Pub. Sts. c. 190, brought by the defendants against Tileston and Hollingsworth, and formerly pending in the Superior Court. The arbitrators duly made an award "that the referees' fees, taxed at five hundred dollars, be paid equally, two hundred and fifty dollars by the complainants, and two hundred and fifty dollars by the respondents; and that neither party recover costs of the other."

This award was accepted by the court, and judgment was minuted upon the docket by the clerk, but the record has never been extended. The respondents then moved for an execution against the complainants for two hundred and fifty dollars, being one half of the referees' fees, as set forth in the award, which, after an argument, the court refused to issue. Thereupon, before the close of the term, a motion was made that the judgment be vacated, and that the matter be recommitted to the referees to amend their award on the subject of costs; and entry was made upon the docket of the clerk at the April term, 1885, of the court, that the case was continued *nisi*, and the record does not show that further action has been since taken in the case.

Before the referees had filed their award, the counsel for Tileston and Hollingsworth met the chairman, Mr. William G. Russell, who said that the award was ready when the fees of the arbitrators, amounting to five hundred dollars, were paid. The counsel said that he would rather pay one half, but the chairman said that he could not have the award until the whole fees were paid, and that the award provided in the usual manner for the payment of the other half by the other side. The counsel supposed he would get an execution for that amount, and thereupon gave five hundred dollars to the chairman, who gave him the award sealed, and he took it to court.

After the acceptance of the award, Tileston and Hollingsworth requested several times of counsel for the complainants that the complainants should pay their half, but the complainants repudiated the payment of the two hundred and fifty dollars made to the referees on their behalf.

Afterwards, prior to bringing this action, in consideration of the two hundred and fifty dollars last above mentioned, the referees made an assignment of their interest or claim against the complainants to Tileston and Hollingsworth, and this action was brought by Tileston and Hollingsworth in the name of the referees. No question was made at the trial as to the reasonableness of the fees charged by the plaintiffs.

The defendants contended: "1. That there is no judgment in the original case upon which the above plaintiffs were referees, and that that case still is in the hands of the court, and that it is for the court to say what course they may take in regard to the same, and it is not yet determined but that they may issue an execution for the costs; and 2. A rule to a reference is different from a submission to arbitrators by an agreement. The whole matter of the reference, the compensation of the referees, the judgment as to costs, the taxing of the costs, the allowance of the fees by two of the referees, is in the hands of the court. By the action of the counsel in paying all the money to the referees, these defendants are deprived of the privilege of being heard on the question of the amount of the costs or the reasonableness of the fees of the referees, to which they had a right."

L. M. Child, for the defendants.

J. R. Churchill, for the plaintiffs.

DEVENS, J. It may be that the plaintiffs would have had a remedy for the non-payment of their fees by some interlocutory order of the court, passed upon their application, and compulsory upon the parties to the suit. The defendants urge that such is their only remedy. Their contention is, that there is no contract which can be implied between themselves and the referees, that the referees were not performing any services for them, but were complying with an order of the court, and that all which they can obtain for their services must be obtained through the intervention of that court. That arbitrators may retain in their own hands their award, until their proper charges for services are paid, has never been doubted, and such is a common practice. This must rest upon the ground that they have rendered services for both parties in making their award, and that before delivering the result of their work they are entitled to receive the value of them. Nor is this inconsistent with a right on the part of the court to control the matter if their demand is excessive and exorbitant.

While in *Virany v. Warne*, 4 Esp. 47, it was held by Lord Kenyon that an arbitrator could not recover against the parties to the arbitration, this cannot be considered the law in England or America at the present time. The rule has been repeatedly stated, that both parties are liable to the arbitrators for their reasonable charges. Where one has paid the whole amount it has also been held that he might recover a moiety thereof from the other, the payment not being deemed on his part to be an officious and voluntary one, but the payment of a sum for which both were liable, and entitling the party paying to contribution from the other. "When two parties agree to employ an arbitrator, and one pays a sum of money to take up the award," says Baron Martin in *Marsack v. Webber*, 6 H. & N. 1, "in reason, justice, and law he is entitled to recover from the other a moiety of the sum so paid." *Swinford v. Burn*, Gow N. P. 5, 7. *Hicks v. Richardson*, 1 Bos. & P. 93. *In re Coombs*, 4 Exch. 839. *Threlfall v. Fanshawe*, 19 L. J. Q. B. 334. *Young v. Starkey*, 1 Cal. 426. *Hinman v. Hapgood*, 1 Denio, 188.

It was held in *South Scituate v. Hanover*, 9 Gray, 420, where commissioners were appointed to establish the boundary line between two towns, under a resolve providing that the fees of

the commissioners should be paid one half by each, that one town could not pay the whole fees and recover the half from the other town. But this was the payment by one town of a liability which the statute had distinctly imposed upon another. The service rendered was not to the two towns, who were not together primarily liable to referees or arbitrators for services performed on their behalf and at their request. The Commonwealth had imposed a definite liability on each on account of its interest in the transaction, which would not be affected by any judgment the commissioners might render. The duty which the commissioners owed to establish the boundary was not owing to the towns, but to the Commonwealth. It was an officious and voluntary act on the part of the plaintiff town to discharge the liability of the defendant town, as it would have been to discharge any other liability properly imposed on it by law.

The defendants urge, that, even if both parties would be liable to the arbitrators, or if this were the case of an arbitration at common law, there is a clear difference in their liability arising from the fact that these were referees under a rule of court. But a reference by rule of court rests upon the agreement of parties. The fact that such agreement has been sanctioned, and that the arbitration thus derives its legal force, effect, and validity from the order of the court, does not change the relation of the parties to the referees in this respect, that they are rendering services to the parties which entitle them to compensation. Even if the court might have ordered the award to be filed on payment of a reasonable sum, it is found that the sum charged by the referees was reasonable, and the court accepted the award, so that the defendants do not have on this account any just ground of complaint. If the original suit is still to be treated as pending in the Superior Court, by reason of the motion to set aside the judgment which has been rendered upon the award of the referees on the question of costs, however this may affect the rights of the parties *inter sese*, the rights of the referees to recover their reasonable fees from them will not be thereby affected.

In certain cases, as where commissioners are appointed under a petition to the judge of probate for a partition of real estate,

these officers are treated as employed by the party petitioning, and as rendering their services at his request. *Potter v. Hazard*, 11 Allen, 187. *Butman v. Abbot*, 2 Greenl. 361. Contribution can then only be obtained from other parties after decree and allowance by the court. These cases depend on the statutory provisions applicable to them, and certainly do not aid the defendants, who were the actors in the original suit.

In the case at bar, Tileston and Hollingsworth, who were the defendants in the original suit, have actually paid the fees of the referees, and received from them an assignment of their claim against the defendants. It is certainly no more than just, when a plaintiff who has seen fit to submit to a reference under a rule of court does not see fit to pay the referees the sum necessary to obtain the award, that the defendant should be allowed to do so, and to treat one half the sum as paid on behalf of the adverse party. Whether, upon the facts existing, the action should more properly have been brought by Tileston and Hollingsworth in their own names against the defendants for money paid on their behalf, or whether it may be brought in the name of the referees, is a question not raised upon the report. *Kennedy v. Owen*, 131 Mass. 431. The ground upon which the defendants have placed their case, namely, that they are under no liability to pay for the services performed by them, is untenable. Had they objected that the suit should have been brought in the name of Tileston and Hollingsworth, undoubtedly a formal amendment would have been permitted, had such been deemed necessary.

Judgment on the finding for the plaintiffs.

JOSEPH B. MOORS & another vs. BENJAMIN GODDARD
& trustees.

Suffolk. March 14, 1888. — June 21, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Trustee Process — Adverse Claimant — Deposit in Bank — Practice.

If the depositor of a draft in a bank for collection has no right, either by contract or usage, before its collection, to draw a check against the proceeds thereof, he is not chargeable as the trustee of a creditor.

TRUSTEE PROCESS. Richard Stone and another, summoned as trustees, appeared and filed an answer, and fully replied to interrogatories filed by the plaintiffs. A claimant of the funds in the hands of the trustees also appeared. Trial in the Superior Court, without a jury, before *Mason, J.*, who ordered the trustees to be discharged, and allowed a bill of exceptions, in substance as follows.

On September 23, 1886, at about eleven o'clock A. M., Mr. Stone received by mail from Washington a United States Treasury draft payable to the order of the principal defendant, which was indorsed by him by writing his name across the back thereof, and by him was delivered to Mr. Stone, pursuant to a written assignment to the trustees, in trust for the claimant. The validity of this assignment the plaintiffs denied, and it involved questions of law and fact not passed upon by the court. Mr. Stone immediately thereafter deposited the draft, without change or additional indorsement, in the Lincoln National Bank, where he then had a balance to his credit, and the amount of the draft was credited upon his deposit-book and upon the books of the bank in his account. The deposit was made in the usual course of dealing between the bank and Mr. Stone, and nothing was said by him or by the officers of the bank in regard to drawing against such credit. The bank, on the same day, at the close of business hours, sent the draft to its correspondent bank in New York, with other checks and drafts drawn on places west of Boston, charging the same to the correspondent bank at the time when sent, and receiving credit from the correspondent

bank as soon as received by it in New York. The Lincoln National Bank had not otherwise heard from the draft since, and had no actual knowledge whether it had ever been presented for payment or not, and no debit entry against the credit had ever been made. At about twelve o'clock, on the same day, the plaintiffs' writ was served upon the trustees, at which time the draft was still in the actual possession of the Lincoln National Bank.

There was evidence tending to show that, by the custom of banks in Boston, checks and drafts received for deposit were credited conditionally, subject to correction on non-payment; that such deposits were not subject to check of depositors until the check or draft deposited was collected, or sufficient time had elapsed for notice of non-payment in due course of business; that in some instances a notice that checks and drafts deposited were so received, and that in their collection the bank acted as agent for the depositor, was printed upon the deposit-book; that the Lincoln National Bank now print the following notice, "Checks received upon deposit are credited subject to payment," upon deposit-books, but did not upon those in use at the time of the deposit in question; that the practice of the Lincoln National Bank, at the time of such deposit, was the same as at the present time, and in accordance with the custom of banks in Boston; that such deposits were entered both on the customer's deposit-book and in the customer's account on the books of the bank, in the same manner as deposits of bank bills were entered, and no change was afterward made in the entries thus made, but in case of non-payment of a check or draft deposited, the amount of the same was entered upon the other side of the account; that banks did, in certain cases, pay checks drawn immediately against deposits of checks or drafts, and that, when they did so, the responsibility of the customer, the responsibility of the drawer and drawee of the check or draft deposited, the bank's knowledge of the genuineness of the paper deposited, and its liability to technical difficulties not apparent upon ordinary inspection, were elements affecting their decision, drafts upon the United States Treasury being subject to peculiar difficulties by reason of the exacting rules of the Treasury Department; that Mr. Stone was of such

financial responsibility that the bank, in its discretion, having reference to this and other elements referred to, would have paid his checks drawn against said draft at any time after said deposit.

There was also evidence of the course of business of banks, with reference to checks and drafts deposited by customers, of the transmission to correspondent banks and final presentation for payment, with the character of credits given in the successive transactions relating thereto, and the control of such checks and drafts at the several stages of transmission for payment, tending to show that the credits given to customers for such deposits were absolute, and not conditional, and subject to immediate control of the customer by check against the same.

The plaintiffs requested the judge to rule: "1. That if, after the deposit by Mr. Stone of the draft in question, and before service of the plaintiffs' writ, said Stone could have received payment of a check drawn on said bank, had such been drawn and presented, for the amount of said draft, then the trustees are to be charged. 2. That if the cashier of the Lincoln National Bank would have paid a draft drawn by said Stone against said deposit of said draft, and presented before the service of this writ, then these trustees are to be charged. 3. That if such a draft would have been paid by said bank before said trustee writ was served, then said trustees are to be charged."

The judge ruled that, except as affected by the alleged assignment, upon the validity of which he did not pass, if Mr. Stone could have drawn against said deposit as of right, or if the bank or cashier would have paid his check against the deposit, pursuant to any agreement implied by the course of dealing between the parties, or pursuant to any contract obligation, then he was to be charged as trustee; but refused to rule that he was to be charged as trustee if he would have been permitted to draw in the discretion of the bank, and the bank would have paid in its discretion, relying on his responsibility, the character of the paper deposited, or both or all the elements which might affect its discretion when not under obligation to pay.

The judge found as a fact, that at the time of service Mr. Stone had not control of the credit entered upon his deposit-book on account of the draft in question, and could not check or draw

upon it as of right, but did not pass upon the question whether the bank would have paid a draft by him against the deposit; and the plaintiffs alleged exceptions.

W. W. Vaughan, for the plaintiffs.

R. R. Bishop & G. Wigglesworth, for the claimant.

No counsel appeared for the trustees.

DEVENS, J. While the question raised by the bill of exceptions, namely, whether the trustees are to be held has been argued before us and before the Superior Court between the plaintiffs and the claimant, it is really one between the plaintiffs and the trustees. A claimant is only concerned when it is ascertained that there are funds in the hands of the trustee originally belonging to the defendant, which, but for the assignment or other title which the plaintiff may have acquired, would be payable to him. An adverse claimant does not come into court for the purpose of showing that there are no goods, effects, and credits of the defendant in the hands of the alleged trustee, which would, ordinarily, be to prove himself out of court, but for the purpose of showing himself entitled to those funds to which, but for his claim, the plaintiff would be entitled. He can have no judgment in his own favor, except in the matter of costs, against either plaintiff, defendant, or trustee. *Gifford v. Rockett*, 119 Mass. 71. *Clark v. Gardner*, 123 Mass. 358. It has, therefore, been held, that a statement of facts signed by the plaintiff and claimant only, and not on behalf of the trustees, who are necessary parties to the judgment, must be discharged. *Massachusetts National Bank v. Bullock*, 120 Mass. 86. *Gifford v. Rockett*, *ubi supra*. The first question in such case is, therefore, as between the plaintiff and the alleged trustee, whether the latter is primarily chargeable; and the second, whether the amount for which he is chargeable has been assigned or is due to any other party, who is entitled to present his claim therefor. In practice these questions undoubtedly are often tried at the same time, if not absolutely together, but they are essentially distinct.

In the case at bar, the only question passed upon by the court was whether the trustees were chargeable, and this in a controversy between the plaintiffs and the claimant. The presiding judge deemed that this was sufficient for the purpose of the case as presented to him, and held it to be unnecessary to consider

the validity of the assignment for the claimant. The trustees had answered fully, and had no wish, apparently, to be heard, but were prepared to submit the case upon their general answer and replies to the interrogatories addressed to them. As the trustees were discharged, if it shall appear, notwithstanding any irregularity of the trial, that the plaintiffs, who are the excepting party, were not entitled, as between themselves and either of the other parties, to any of the rulings requested by them, no injustice will have been done. It might be said, parenthetically, that it would seem that the questions, upon the one hand, whether the trustees were not entitled to be discharged upon their whole answer, and upon the other, whether the trustees were not chargeable by reason of the fact that Mr. Stone deposited in the bank the draft belonging to the principal defendant as his own, might fairly have arisen at the hearing. But the bill of exceptions is not so framed as to present them, nor could we assume that it contains all the facts necessary to be stated if they were open for discussion. The questions presented by the bill of exceptions only are before us, and no other part of the case is brought here for revision. This has been often decided, and the reasons for such a decision are so obvious, that they do not require re-statement. *Richardson v. Curtis*, 2 Gray, 497. *Jones v. Sisson*, 6 Gray, 288. *Wall v. Provident Institution for Savings*, 3 Allen, 96. *Ames v. McCamber*, 124 Mass. 85.

The principal defendant had received a Treasury draft, and had indorsed it to Mr. Stone, to be collected and devoted by him to certain purposes specified in a written agreement with the trustees. It was deposited by Mr. Stone in the Lincoln National Bank in Boston, and he was credited with the amount of it in his pass-book. While this draft was yet in the bank and unpaid, the plaintiffs' writ was served on the alleged trustees. The validity of an attachment by trustee process must be determined by the state of facts existing at this time.

The rulings requested by the plaintiffs vary in form, but they were, in substance, that if, after the deposit of the draft by Mr. Stone, he could or would have received payment for the amount of it by a check drawn upon the bank for the amount of it, the trustees should be charged. The plaintiffs did not claim to hold the trustees as such on account of their having

received and deposited the draft to their own credit, or because they had a draft belonging to the plaintiffs for which, when collected, they were to account. It has often been held that choses in action, as notes, drafts, checks, etc., uncollected, which have been deposited with another to be thereafter collected, do not render him liable to be charged under the trustee process. *Lupton v. Cutter*, 8 Pick. 298. *Lane v. Felt*, 7 Gray, 491. *Hancock v. Colyer*, 99 Mass. 187. The position of the plaintiffs was and is, that the property in the draft had passed to the bank, that Mr. Stone was a creditor to the amount of it to the bank, and that if in fact he could have collected the money for it whenever he called for it, it is immaterial whether he could have enforced a payment for it from the bank. In reply to the plaintiffs' requests, the court ruled that, except as to the alleged assignment for the claimant, on the validity of which it did not pass, "if Mr. Stone could have drawn against said deposit as of right, or if the bank or cashier would have paid his check against the deposit pursuant to any agreement implied by the course of dealing between the parties, or pursuant to any contract obligation, then he was to be charged as trustee; but refused to rule that he was to be charged as trustee if he would have been permitted to draw in the discretion of the bank, and the bank would have paid in its discretion, relying on his responsibility, the character of the paper deposited, or both or all the elements which might affect its discretion when not under obligation to pay." The court further found as a fact, "that at the time of service Mr. Stone had not control of the credit entered upon his deposit-book on account of the draft in question, and could not check or draw upon it as of right," but did not pass upon the question whether the bank would have paid a draft by said Stone against said deposit. It further ordered the trustees to be discharged.

This finding of facts was fully justified by the evidence, tending to show that, by the custom of the banks in Boston, checks and drafts were credited conditionally, subject to correction on non-payment; that such deposits were not subject to check of depositors until the check or draft was collected; or sufficient time had elapsed for notice of non-payment in the course of business; that banks did, in certain cases, pay checks drawn

immediately against deposits of checks or drafts, and that when they did so the responsibility of the customer, the responsibility of the drawer and drawee of the check, or character of the draft deposited, and various other elements, affected their decision. There was also evidence from other sources, that credit for the deposit of checks or drafts was absolute, and not conditional. So far as there was a conflict of evidence on this subject, it was a matter for the final decision of the presiding judge. With the usage of the bank with which Mr. Stone dealt, as it is found by the judge to have existed, he must be held to have been acquainted. The circumstance, that, by engaging his personal responsibility, Mr. Stone could have obtained the money for the draft, did not make him liable for the amount of it to the principal defendant, whose property it was when confided to him. Until the bank was under a legal obligation to pay him, there was no pecuniary legal obligation on his part to the principal defendant. No person is to be "adjudged a trustee by reason of any money or other thing due from him to the defendant, unless it is at the time of service of the writ on him due absolutely and without depending on any contingency." Pub. Sts. c. 183, § 34, cl. 4.

It is suggested that a deposit of the draft, for which credit was given by an entry on the books of the bank in the same manner as deposits of bank bills, must be held to have vacated the relation of debtor and creditor between the bank and trustee. If so, the trustee would certainly have had at once a right of action for the amount of the draft, which by the usage of the banks in regard to such deposits it is found he did not. The entry made, whether called a memorandum or by any other name, must be construed with reference to this usage, and did not make the bank liable to the depositor of the draft at all events. The plaintiff urges that the case of *Hancock v. Colyer*, 103 Mass. 396, is practically decisive in his favor. We do not so consider it. In that case the trustees had collected the amount of the check in money, had deposited it subject to their own order in the bank, and it was liable to be immediately drawn out by them, as of right, when the trustee process was served. They could not have taken more complete possession of the money.

Exceptions overruled.

CHARLES D. WHIPPEN vs. ANNIE C. WHIPPEN.

Suffolk. March 15, 1888. — June 21, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Divorce — Desertion — Presumption of Death — Actual Knowledge —
Remarriage — Adultery — Polygamy.*

If a husband, who has been deserted by his wife for seven years, and who has no actual knowledge that she is alive, goes through a form of marriage and cohabits with another woman, he is guilty of adultery, and is precluded from obtaining a divorce for such desertion, there being no presumption of the wife's death, and it not appearing that he had no belief or reason to believe that she was alive, or information which would lead upon inquiry to actual knowledge.

LIBEL, filed June 25, 1887, for divorce on the ground of desertion. Hearing before *C. Allen, J.*, who reported the case for the consideration of the full court as follows. The desertion, which was alleged to have taken place on February 5, 1875, was proved. Immediately thereafter the libellee moved from Boston, where she had lived with the libellant, to Cambridge, and her place of residence was known to the libellant. She has ever since lived in Cambridge and Boston, at different places, but under no concealment. There was no presumption of her death. On October 23, 1883, the libellant married again. At this time, the libellee had remained absent from him for seven years together, he not actually knowing her to be living within that time. If, upon these facts, the libellant was entitled to a divorce, then a decree for a divorce was to be entered; otherwise not.

J. F. Wakefield, for the libellant.

No counsel appeared for the libellee.

W. ALLEN, J. We understand the finding in the report of the libellant's marriage to include the fact of cohabitation. The argument for the libellant is, that, as the libellee had at that time deserted him and been absent from him for seven years, he not actually knowing her to be living within that time, he was not guilty of polygamy, and that cohabitation under such a marriage would not be adultery. Assuming, without deciding, that the words "not knowing" in the statute defining polygamy,

Pub. Sts. c. 207, §§ 4, 5, have the same meaning as the words "not actually knowing" in the report, and that, upon the facts stated in the report, the libellant could not be convicted of polygamy, it does not follow that the cohabitation was not adulterous. Even if the libellant could not be punished under the statute for the marriage, it was void, and did not affect his former marriage. He had a wife from whom he had not been divorced, and, unless there was a presumption of her death, cohabitation with another woman was adultery. *Commonwealth v. Mash*, 7 Met. 472. *Commonwealth v. Thompson*, 6 Allen, 591, and 11 Allen, 23. The report expressly finds that there was no presumption of the death of the wife. If there had been such a presumption during cohabitation, there would be much reason for granting a divorce to the libellant, not only because he would not have been guilty of adultery under the criminal law, but because, by reason of her presumed death, he could not have obtained a divorce from his wife. *Bodwell v. Bodwell*, 113 Mass. 314. The St. of 1884, c. 219, was enacted subsequently. But where there is no presumption of her death, and it does not appear that he did not have reason to believe, and that he did not believe, that she was alive, or that he did not have information of her which would have led to actual knowledge had he made inquiry, the fact that he did not have actual knowledge that she was living is no excuse for cohabiting with another woman after a form of marriage with her.

The fact that she had given him cause of divorce from her for desertion did not prevent his subsequent adultery from being such a violation of his marital duties as would preclude him from taking advantage of her wrong.

Libel dismissed.

FIRST AFRICAN METHODIST EPISCOPAL SOCIETY *vs.*
BENJAMIN F. BROWN.

Suffolk. March 22, 1888. — June 21, 1888.

Present : MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Deed — Caveat in Registry of Deeds — Fraud — Cloud upon Title —
Specific Performance — Laches.*

A paper signed by a grantor and filed by him in the registry of deeds, alleging that the conveyance was obtained from him by fraud and that he shall dispute its validity, does not, in the absence of confirmatory facts or of proceedings for more than six years to enforce his rights, constitute a cloud upon title such as will bar specific performance.

BILL IN EQUITY, filed March 2, 1887, for the specific performance by the defendant of an agreement to purchase land.

The bill alleged that the plaintiff, on December 1, 1886, entered into an agreement in writing with the defendant for the sale and purchase of the land, which agreement, after reciting that the land was conveyed to the plaintiff by one John Scott, by deed dated August 29, 1879, and recorded with Norfolk Deeds, lib. 513, fol. 219, provided for its conveyance to the defendant by a good and clear title. The answer set up that the plaintiff was unable to give a good and clear title, because Scott, the plaintiff's grantor, had placed upon the records in the Norfolk Registry of Deeds a paper, dated September 27, 1880, signed by Scott with his mark, and acknowledged before a justice of the peace on the same day, which, after reciting his conveyance of the land to the plaintiff as set forth in the agreement, proceeded as follows :

"Now, this is to give notice that the said deed of conveyance to said First African Methodist Episcopal Society, recorded in said Norfolk Registry, lib. 513, fol. 219, was obtained from me by fraud and covin ; that I never intended to convey said property to said society ; and I hereby notify any person taking title from said society, that I shall dispute the validity of said deed, and that in case of my decease I have left instructions in my will for the prosecution of proceedings for the recovery of said property from said society."

Hearing on the pleadings, before *C. Allen, J.*, who reported the case for the consideration of the full court, as follows.

"This is a bill in equity to enforce the performance by the defendant of an agreement to buy a piece of land of the plaintiff. The case came on to be heard before me on the bill, answer, and amended answer. No issue of fact was thus raised, but I asked counsel if defendant was aware, at the time of making his agreement to purchase, of the existence of the document or claim of plaintiff's grantor, to the effect that the deed was obtained from him by fraud. Counsel said defendant was not aware of it, and I so assume. It seemed to me that the validity of plaintiff's title depended on the determination of the question of fraud, and that, in view of the claim of Scott, the plaintiff's grantor, and of the document which he put on record, it was unreasonable to require the defendant to take the risk of investigating and litigating that question, or the chance of the objection being pressed. I therefore dismissed the bill, and make this report, which is to stand only in case the plaintiff duly enters an appeal."

The case was argued at the bar in March, 1888, and afterwards was submitted on the briefs to all the judges.

B. C. Moulton, for the plaintiff.

A. J. Pratt, for the defendant.

DEVENS, J. There is no provision by statute for filing in the registry of deeds any document of a character similar to that which Scott was permitted there to place upon record. It acquired no greater importance from being thus filed, nor did it for this reason constitute a cloud upon the title of the plaintiff. Pub. Sts. c. 126, § 13. *Nickerson v. Loud*, 115 Mass. 94. The question presented by the case at bar is, therefore, whether a mere assertion by the plaintiff's grantor, some seven years since, unsupported by any evidence or any subsequent action on his part, that the deed from him to the plaintiff was obtained by fraud, and that he shall dispute its validity, renders the plaintiff's title so doubtful that the defendant will not be compelled, to accept it and comply with his contract to pay for the land. In *Nickerson v. Loud*, *ubi supra*, a paper signed and recorded in the registry of deeds by A., who was not the plaintiff's grantor, stating that certain real estate, the record title to which was in B., was held by B. subject to a trust in favor of A. and

others, and that A. would dispute any title that B. might attempt to make, was held not to constitute a cloud on the title. Whether recorded or unrecorded, such statements could not, under such circumstances, be evidence against B. or in favor of A., and it was held that B. was not entitled to an order directing the paper to be withdrawn by A. from the registry, or surrendered to him.

The general rule is well settled, that, in order to maintain a bill for specific performance of a purchase of land, the plaintiff must show that the title tendered by him is good beyond reasonable doubt. But a doubt must be reasonable, and such as would cause a prudent man to pause and hesitate before investing his money. It would be seldom that a case could occur where some state of facts might not be imagined which, if it existed, would defeat a title. When questions as to the validity of a title are settled beyond reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made. *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400. Thus, it might be conceived in a case similar to that at bar that the plaintiff's grantor, from infancy, insanity, or similar cause, was without legal capacity to have conveyed to it, but the plaintiff would not therefore be required to prove affirmatively the existence of such capacity before he could insist on the performance by the defendant of his contract. It would be often practically impossible for a party to negative all objections which might be imagined, and which, if they existed, would defeat his title. Whether a party shall be compelled to perform a contract for the purchase of land is often, therefore, a matter within the discretion of the court; not certainly of arbitrary or capricious discretion, but, as said Mr. Justice Story, "of that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but which at the same time withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties." Story Eq. Jur. § 742, and authorities cited. Where an appointment was made by a husband and wife to their eldest daughter, under a settlement giving them successive life estates with remainder to their children as they should appoint, and, in default of such appointment to all their children, the

husband and wife appointed the whole estate to their eldest daughter, and a short time after such appointment, with the eldest daughter, made a mortgage, under the foreclosure of which the plaintiff claimed title. One of the younger children had given notice to the plaintiff not to complete his title, nor to pay the purchase money, as the appointment and mortgage had been made in fraud of the settlement. It was held that a mere allegation of this sort, which was only a statement of a possibility, which every one could see, on looking at the transaction, might have existed without a single fact being brought forward to impeach the deeds, and which had not been followed by any proceedings to set them aside, did not afford any reason why the contract of purchase should not be performed. *Green v. Pulsford*, 2 Beav. 70. This case is restated with approval, and followed by Lord Chancellor Truro, in *Grove v. Bastard*, 1 DeG. M. & G. 69, where the inquiry suggested by it arose incidentally on a question of costs.

The precise question here discussed has never been decided in this court, but an examination of our cases on the general subject will show that, in all in which a defendant in a bill for specific performance has been held not bound to accept a title, facts have appeared showing that the property was or might be subjected to adverse claims such as might reasonably be expected to expose the purchaser to controversy in order to maintain his title. *Jeffries v. Jeffries*, 117 Mass. 184. A doubt, says Lord Eldon, "must be a considerable, a rational doubt," and such as would induce a prudent man to pause and hesitate. *Stapylton v. Scott*, 16 Ves. 272. Although the remark is made with reference to a doubt as to the construction of a deed, it has equal application where it arises from a possible or conceivable state of facts. We have found no case where a stranger to a contract, even if the grantor from whom the party seeking to enforce it derives title, has been able by mere assertion practically to destroy the marketability of the title which he has granted, and thus to throw such a stain upon it that for purposes of sale it is valueless. *Kostenbader v. Spotts*, 80 Penn. St. 430. *Vreeland v. Blauvelt*, 8 C. E. Green, 483. But even if in any case we should be willing to hold that mere threats would make a title doubtful, the case at bar has this peculiar feature, that for more than six years the injured party, as

he alleges himself to be, has slept upon his rights, and made no attempt to assert them. Where one takes a fraudulent title with notice thereof, or of facts and circumstances which fairly put him on his inquiry as to whether a fraud has not been committed, he is not indeed held to be an innocent purchaser, even if he has paid full value. But where no facts or circumstances either of suspicion or doubt have been brought to his attention, he cannot be deemed to have lost that character, even if he has heard of an assertion, made more than six years ago, like that of the plaintiff's grantor, unsupported by any evidence, and unsustained during that time by any proceedings to avoid or annul the conveyance. *Carroll v. Hayward*, 124 Mass. 120. *Hopkins v. Langton*, 30 Wis. 379. *Decree for the plaintiff.*

ELLA A. JACKMAN & others vs. BERTHA C. NELSON.

Suffolk. March 22, 23, 1888. — June 21, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Beneficiary Association — Widows and Orphans' Fund — Children.

A certificate of membership in a beneficiary association provided for the payment of a certain sum out of a widows and orphans' fund to the wife of a member at his death, "for the benefit of herself and the children of said member." *Held*, that the widow and such children were entitled to share equally in such sum, although one child had left her father's house prior to his death and was no longer dependent upon him.

BILL IN EQUITY, by the daughters of Horace Nelson against his widow, to compel the distribution of a fund of \$3,000, the proceeds of a certificate of membership issued to him in the Royal Arcanum. Writ dated February 15, 1886. Hearing in the Superior Court, before *Hammond*, J., who reported the case for the determination of this court, such decree to be entered as law and justice might require, in substance as follows.

Horace Nelson, on July 3, 1879, became a member of the Royal Arcanum, a beneficiary association, whose certificate of incorporation recited that it was formed "for the purpose of fraternal union, aid to its members and their dependants, the

education socially, morally, and intellectually of its members, assisting the widows and orphans of deceased members, establishing a fund for the relief of sick and distressed members, and one for a widows and orphans' benefit fund." The constitution of the society set forth, among other objects of the order, the following: "2d. To give all moral and material aid in its power to its members and those dependent upon them. 3d. To educate its members socially, morally, and intellectually; also to assist the widows and orphans of deceased members. . . . 5th. To establish a widows and orphans' benefit fund, from which, on the satisfactory evidence of the death of a member of the order, who has complied with all its lawful requirements, a sum not exceeding three thousand dollars shall be paid to his family, or those dependent on him, as he may direct."

The by-laws of the society contained the following provisions: "Sect. 2. (1.) Each applicant shall enter upon his application the name or names and relationship or dependence of the members of his family, or those dependent upon him, to whom he desires his benefit paid, and the same shall be entered in the benefit certificate according to said direction. . . . (3.) When no relation by marriage or consanguinity is shown in the direction for payment of a benefit, proof of dependency must be furnished satisfactory to the supreme secretary before the benefit certificate is issued. Sect. 3. (1.) A member may, at any time when in good standing, surrender his benefit certificate, and a new certificate shall thereafter be issued, payable to such beneficiary or beneficiaries as such member may direct, in accordance with the laws of the order."

The certificate of membership in the society was dated July 8, 1879, and recited that it was "issued to Horace Nelson, a member of Agassiz Council, No. 45, Royal Arcanum, located at North Cambridge, Mass., upon evidence received from said council that he is a contributor to the widows and orphans' benefit fund of this order," and that the society promised and bound itself to pay out of that fund to "Bertha C. Nelson (wife), for the benefit of herself and the children of said member, a sum not exceeding three thousand dollars, in accordance with and under the provisions of the laws governing said fund."

Nelson continued to be a member in good standing until he

died, in August, 1885, leaving a widow, the defendant, and three daughters, of whom the plaintiffs Ella A. Jackman and Jennie L. Nelson were by a former wife, and the plaintiff Carrie B. Nelson was by the defendant. The first-named plaintiff was about seventeen years old when Nelson became a member of the society, and was married at the age of nineteen, at which time she left her father's house, and had been supported by her husband ever since. Jennie L. Nelson, a minor, lived with her father until his death, but since that time had lived with her sister Ella A. Jackman, and had been supported by the husband of the latter. Carrie B. Nelson, also a minor, always lived with her father, and since his death had lived with her mother and been supported by her. The society paid to the defendant, at the death of her husband, the sum of \$3,000, and the first-named plaintiff had demanded of her both her own share, and, as guardian, that of her sister; but the defendant had refused to pay anything to her, claiming the right to spend it at her discretion.

A. Wellington, for the plaintiffs.

W. H. Powers, for the defendant.

C. ALLEN, J. One of the purposes of the Royal Arcanum society, as expressed in the certificate of incorporation, was "assisting the widows and orphans of deceased members," and establishing a fund for "a widows and orphans' benefit fund." The constitution specified, as an object of the society, "to assist the widows and orphans of deceased members," and "to establish a widows and orphans' benefit fund, from which . . . a sum not exceeding three thousand dollars shall be paid to his family, or those dependent on him, as he may direct." In the by-laws it was provided that "Each applicant shall enter upon his application the name or names and relationship or dependence of the members of his family, or those dependent upon him, to whom he desires his benefit paid, and the same shall be entered in the benefit certificate according to said direction." Also, "When no relation by marriage or consanguinity is shown in the direction for payment of a benefit, proof of dependency must be furnished," etc. From these various provisions it appears that the word "orphans," as used by the society, means children of deceased members, whether their mother is living or not, and

that it is within the plan of the society to assist such children, whether they were dependent upon the member or not. This line of distinction is very carefully shown, both in the provision of the constitution and in the by-laws above copied.

It remains to consider the nature of the interest acquired by Mrs. Nelson in the money paid to her by the society. The certificate of Nelson's membership recites that he was a contributor to the widows and orphans' benefit fund, and the payment upon his death was to be made out of that fund; and it was payable to the wife, "for the benefit of herself and the children of said member." At the time when he became a member of the society he had two children, both of whom were by a former wife; and at his death he left these two children, who are plaintiffs, and one other child, the date of whose birth does not appear, by the present Mrs. Nelson. The eldest child was about seventeen when he joined the society and took his certificate, and was twenty-three when he died, she having been married four years before his death, and having lived with her husband after her marriage. Nelson had a right, under the constitution and by-laws of the society, to change the designation of beneficiaries under his certificate, but he did not do so.

In the first place, it is plain that Mrs. Nelson is not entitled to hold this money absolutely. Even under similar language in a will, the children would have a right which they could enforce in a court of equity. *Proctor v. Proctor*, 141 Mass. 165. *Loring v. Loring*, 100 Mass. 340. *Williams v. Bradley*, 3 Allen, 270, 281, 285. *Raikes v. Ward*, 1 Hare, 445. *Crockett v. Crockett*, 1 Hare, 451; *S. C.* on appeal, 2 Phil. 553. *In re Harris*, 7 Exch. 344.

There is nothing to show that it was intended that the sums to be devoted to the benefit of the children should be, in the first instance, determined by her in her discretion, subject to accountability. There are no words saying that it shall be at her disposal for their benefit, or that she is to maintain or support them. In the purposes of the Royal Arcanum, children are placed on an equality with widows. There is nothing showing any intention to have a permanent or continued trust. The words of the certificate are simple. She is to take the money "for the benefit of herself and the children." In many of the

cases under wills, there was some thing to show some discretion reposed in the primary donee, or some duty of support, or some power of disposal; but here there is nothing of the kind. Several of the cases under wills tend strongly to show that, under language like this, the widow and the children would be entitled to share equally. *Jones v. Foote*, 137 Mass. 543. *Loring v. Loring*, 100 Mass. 340. *Proctor v. Proctor*, 141 Mass. 165. *Jubber v. Jubber*, 9 Sim. 503.

In the present case, in view of the circumstances, and of the bald language used in the certificate, we cannot go behind the plain words, and are of opinion that Mrs. Nelson and the three children are each entitled to one fourth part of the money. The circumstance that Mrs. Jackman was married, and had left her father's house, does not cut her off. It would not necessarily do so under a devise. *Proctor v. Proctor*, *ubi supra*. Under this certificate, her rights do not at all depend upon the question whether she was forisfamiated or not.

Decree for the plaintiffs.



NATHANIEL B. MANSFIELD vs. BENJAMIN E. HODGDON
& others.

Suffolk. March 23, 1888. — June 21, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Covenant to sell Land — Specific Performance — Waiver — Tender —
Notice — Dower.*

If the owner of land makes a covenant, his wife not joining, to sell it, and, after preventing the covenantee, who seasonably elects to take it, from tendering the purchase money, conveys it to another, who has notice of the covenantee's rights, and to whom the wife releases dower for part of the land, the covenantee, who consents that the wife retain that portion, is entitled to specific performance against both the covenantor and his grantee.

HOLMES, J. This is a bill specifically to enforce a covenant to sell to the plaintiff "the farm situated in that part of Mount Desert Island called Pretty Marsh, and consisting of between two hundred and sixty and two hundred and seventy acres, and

standing in the name of Benjamin Hodgdon, for the sum of fifteen hundred dollars cash, at any time within thirty days from the date hereof." The instrument is dated January 15, 1887, and is signed by the defendant Hodgdon, but not by his wife. The defendant Clara E. Allen is a subsequent grantee of the premises, and the remaining defendant, William H. Allen, is her husband. The judge who heard the witnesses made a decree for the plaintiff, and, the evidence having been reported, the defendants appealed.

Giving to the finding of the judge the weight which it must have, we think the evidence must be taken to establish the following facts. The instrument was sealed by Hodgdon, and has not been altered. The plaintiff expressed his election to purchase within the thirty days allowed. There was evidence of a message to that effect having been left at Hodgdon's house within ten days. It appears that a blank deed to the plaintiff and another was left there about the same time, and there was evidence that a message was sent to Hodgdon to execute it if he found it correct. There was also evidence that the deed was returned unexecuted, with the message that Mrs. Hodgdon refused to sign it, and with no other objection in the first instance. These facts warranted a finding that sending the deed implied, and was understood to imply, notice that the plaintiff intended to buy, at least if the deed corresponded to the contract, (see *Warner v. Willington*, 3 Drew. 523, 533,) and perhaps whether it corresponded or not, as the message even as testified to by Hodgdon imported a willingness to correct mistakes.

The defendants take the ground that this deed did not correspond to the contract, because the deed included a mountain lot which is alleged not to be included in the land described by the contract. The question whether that lot is included in the contract is also important, of course, in deciding what land, if any, the defendant Allen should be required to convey. The words used must be construed in the light of the circumstances, and thus construed they might well have been found to import, and to have warranted the plaintiff in understanding that they imported, all the defendant Hodgdon's land in Mount Desert.

Hodgdon owned only three lots in Mount Desert. Two, of seventy and eighty acres respectively, are admitted to be em-

braced in the contract. The mountain lot, seemingly then regarded as of little or no value, and said to contain sixty acres, brings the total up to two hundred and ten acres. The contract was for between two hundred and sixty and two hundred and seventy acres. Hodgdon says that the plaintiff was introduced to him by a letter saying that he wished the refusal of the property down East for thirty days, evidently suggesting a bargain for the whole. The plaintiff testifies that, before signing, Hodgdon said that he had not so much land as was mentioned, but had so many acres in one lot, so many in another, and so many in a third, amounting in all to two hundred and fifteen acres, and that was all he owned; that the plaintiff said it did not make any difference whether it was two hundred and fifteen, or two hundred and sixty, or two hundred and seventy acres; and that thereupon Hodgdon signed. Hodgdon acquired all the land by one deed, had previously offered the whole land as two hundred and sixty acres to others, subsequently made a deed of the three lots to the plaintiff, which was not delivered, and conveyed them by a similar deed to the defendant Mrs. Allen.

It is suggested that Hodgdon understood that the plaintiff was to pay him \$1,500 for the land subject to a mortgage. But the agreement contains no such qualification, and must be construed as an agreement to convey a good title free from incumbrances, which there is evidence tending to show was the meaning of the parties. *Linton v. Hichborn*, 126 Mass. 32. If, without the plaintiff's knowledge, Hodgdon did understand the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligations must be measured by his overt acts. *Western Railroad v. Babcock*, 6 Met. 346, 352. *O'Donnell v. Clinton*, 145 Mass. 461, 463.

The plaintiff, although he signified his election to take the land within thirty days, did not pay or tender the money within that time. But there is evidence that Hodgdon was responsible for this. At or soon after the time when word was sent that Mrs. Hodgdon refused to sign, a demand or request was made that Mrs. Hodgdon should have three acres out of one of the other lots as a consideration for her signing the deed. Of course, under the contract the plaintiff had a right to call upon Mr. Hodgdon to give a good title to the whole, but he was disposed

to yield something. A discussion ensued, of course on the footing that the plaintiff was desirous of making the purchase, which of itself was evidence that the defendant Hodgdon had notice of the fact, and this was prolonged beyond the thirty days. When the parties came to terms, a new deed was prepared and tendered, was executed by the Hodgdon, and was handed to a Mr. Chapin, who had acted as a go-between. But later in the same day Chapin was ordered not to deliver the deed, and the bargain with the plaintiff was repudiated. There is no dispute that the plaintiff was ready to pay for the land at any time when he could get a conveyance.

Afterwards Hodgdon conveyed to Mrs. Allen, Mrs. Hodgdon releasing dower. But Mrs. Allen had full notice of the agreement with the plaintiff before the conveyance to her, and before any agreement was made with her or her husband, and, although informed that the thirty days had gone by, she had notice that the plaintiff was expecting a conveyance, and that Hodgdon might have trouble by reason of his refusal to convey to the plaintiff. *Connihan v. Thompson*, 111 Mass. 270. *Hansard v. Hardy*, 18 Ves. 455, 462. Mr. Allen was asked whether he knew that the plaintiff had sued Hodgdon for damages before the purchase. This must have meant before the final conveyance to Mrs. Allen, as Mrs. Allen was party to getting the deed back from Mr. Chapin, and had notice of the plaintiff's rights at that time, before any suit was begun. But the evidence was excluded, and Mr. Allen's answer is not properly before us. He did not suggest that he was led by his knowledge to assume that the plaintiff would not seek specific performance, and must be taken to have known that the plaintiff still had the right to do so. *Connihan v. Thompson*, *ubi supra*.

The defendant Hodgdon's undertaking not having been a mere offer, but a conditional covenant to sell, bound him irrevocably to sell in case the plaintiff should elect to buy, and should pay the price within thirty days. The usual doctrine as to conditions applies to such a covenant, and as the covenantor by his own conduct caused a failure to comply with the condition in respect of time, he waived it to that extent. And upon the same principle he exonerated the plaintiff from making any tender when the new terms had been agreed upon, by wholly

repudiating the contract. *Carpenter v. Holcomb*, 105 Mass. 280, 282. *Ballou v. Billings*, 136 Mass. 307. *Gormley v. Kyle*, 137 Mass. 189. *Lowe v. Harwood*, 139 Mass. 133, 136. If it be true, as testified for the defendant, that he also objected to signing a deed conveying the mountain lot, this was a further excuse for the delay. *Galvin v. Collins*, 128 Mass. 525, 527.

A covenant to sell is not voluntary in such a sense that equity will refuse specific performance. If the defendant conveys, he will get *quid pro quo*. *Western Railroad v. Babcock*, 6 Met. 346. *Irwin v. Gregory*, 13 Gray, 215. *Eastman v. Simpson*, 139 Mass. 348, 349. The description in the contract embracing all the land owned by the defendant at Mount Desert was sufficient. *Bacon v. Leonard*, 4 Pick. 277. *Hurley v. Brown*, 98 Mass. 545. *Rankin v. Wood*, 12 Gray, 34. *Mead v. Parker*, 115 Mass. 413. *Doherty v. Hill*, 144 Mass. 465.

It is objected, that the decree gives the plaintiff a title free from Mrs. Hodgdon's right of dower, and that, as Mrs. Hodgdon was not bound to release her dower to him, he ought not to profit by her release to Mrs. Allen. But who suffers injustice, or has a right to complain? Not Mrs. Hodgdon, who is not a party to or interested in these proceedings. She has released and extinguished her dower, and she retains the consideration which she received for it, as the three acres demanded by her are excepted from the conveyance ordered by the decree. Mr. Hodgdon cannot complain, as he contracted to convey a clear title. And the defendant Mrs. Allen, having taken Hodgdon's title with notice of the plaintiff's rights, and therefore charged with a trust in his favor, of course is bound to convey that title. The release of dower extinguished Mrs. Hodgdon's inchoate right, and did not convey a distinct interest to Mrs. Allen. *Learned v. Cutler*, 18 Pick. 9, 11. *Tirrel v. Kenney*, 137 Mass. 30, 32.

Without considering whether, if justice required it, the defendant Allen might not be protected by treating the incumbrance as if it still existed, there is no ground for doing so in this case. Mrs. Allen, through her husband, actively promoted Hodgdon's breach of agreement. If she receives back from him the consideration which she paid in excess of that ordered to be paid to her by the plaintiff, she will be *in statu*

quo, and the loss will fall on Hodgdon, as it ought to do, unless there was some arrangement by which the Allens were to indemnify him. In any event, no wrong will be suffered by any one, and the plaintiff gets what he contracted for.

Decree affirmed.

F. S. Hesseltine, for the defendants.

G. Putnam & J. Fox, for the plaintiff.

DANIEL W. JAYNES vs. GUSTAVUS GOEPPER & others.

Suffolk. March 28, 1888. — June 21, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Partnership Settlement — Fraud — Equity Practice — Multifariousness — Laches.

A bill in equity for the opening of a partnership settlement alleged that, in 1881, the plaintiff was induced by the fraud of his partner to make a settlement by which the plaintiff got less than his share; that such partner died in June, 1885, the property disposed of by his will belonging to the partnership; that before his death such partner had purchased other property with firm moneys, and given it without consideration to various persons other than his executors and devisees; and that the plaintiff had no knowledge of the fraud until June, 1885. The bill was brought against the partner's executors, devisees, and donees, and was filed immediately after the limit within which the executors could not be sued had expired. *Held*, that the bill could be maintained, that it was not multifarious, and that the plaintiff had not been guilty of laches.

BILL IN EQUITY, filed September 28, 1887, by Daniel W. Jaynes, against the executors of the will of his former partner, James H. Eames, the devisees under his will and the husbands of some of them, and certain donees of Eames during his lifetime. The bill contained the following allegations:

That in 1868 a copartnership was formed at St. Louis, in the State of Missouri, between Jaynes and Eames, under the firm name of Jaynes and Company, to carry on the business of coo-
perage, and of manufacturing and selling barrels; that the capital of the firm at the outset did not exceed five hundred dollars, and that by the terms of the partnership the net profits of the

business were to be divided equally between them ; that in 1873 the firm extended its business and established at Cambridge, Mass., a factory, of which Eames took personal charge, while the St. Louis business was put under the immediate supervision of Jaynes, the partnership agreement embracing both branches of the business ; that, for the purpose of obtaining staves and other materials to be used in the Cambridge business, Eames afterwards purchased with firm moneys real estate and other property near Toledo, Ohio, and elsewhere ; that from 1873 to 1881, and especially from 1876 to 1881, Jaynes was seldom at Cambridge, and when he was there Eames so arranged matters that Jaynes had little opportunity to learn the actual state of the business conducted there except from the statements of Eames ; that in 1876 Eames represented to Jaynes that the Cambridge business, by reason of losses, had become a losing business ; that Eames continued to make the same representations to Jaynes between 1876 and 1881, while in fact the business during that time was very profitable ; and that such representations by Eames to Jaynes were false and fraudulent, and intended to mislead him as to the real condition of the Cambridge business, and resulted in so misleading him.

That during the same time Eames was frequently at St. Louis, and was familiar with the condition and value of the partnership business and property there ; that on or about March, 1881, Eames came to St. Louis and proposed to Jaynes to dissolve the partnership and to divide the firm property ; that Eames proposed that Jaynes should take as his share the St. Louis business, which was worth about \$20,000 after paying all liabilities, and that Eames should take as his share the Cambridge business, including the purchases near Toledo and elsewhere ; that, to induce Jaynes to consent to the proposed dissolution and division, Eames falsely and fraudulently, and with intent to deceive, represented to him that all the property and assets connected with the Cambridge business amounted to less than \$20,000 above all liabilities ; and that Eames falsely and fraudulently, and with intent to deceive, repeatedly assured Jaynes that the proposed division was an equal one, knowing that all such representations were false.

That Jaynes, relying on these representations, agreed to

Eames's proposition for a dissolution and for a division of the partnership property on the basis proposed by him; that an instrument or instruments in writing were thereupon drawn up and signed by them to effectuate the agreement; that the statements and representations of Eames to Jaynes were, however, wholly false and fraudulent, the firm property connected with the Cambridge business and conveyed to Eames amounting in value to about \$200,000, as Eames well knew; and that Jaynes did not find out until June, 1885, that the statements and representations of Eames were false, nor that the Cambridge business conveyed to Eames was valued at said sum of \$200,000.

That prior to June, 1885, Eames had also fraudulently, and without the assent of Jaynes, made purchases with firm moneys of a large amount of property, and had given it to various persons, who continued to hold such property, and none of whom had paid any consideration therefor, — namely, of real estate, which he had given to his wife, Elizabeth B. Eames, and to Ella B. Murray, both defendants, and of bonds and shares of stock, which he had given to his wife and Ida L. Nelson, another defendant, respectively; that on June 17, 1885, Eames died, testate, and his will was duly admitted to probate, on appeal, on March 3, 1886, the defendants Goepper and Solon Bancroft being duly appointed executors on that day, and accepting the trust; that on April 17, 1886, the plaintiff filed a bill in equity of like tenor with the present bill, which was discontinued as premature within the statute limiting actions against executors and administrators; and that the plaintiff after the lapse of the time limited by the statute brought the present bill, the defendants other than such executors being the devisees of Eames, or the husbands of some of them, and such donees.

That all the property and estate which Eames had at his death which he undertook to dispose of by will was the property of the partnership, either profits of the business received by him, or property bought by him out of such profits; that such profits had never been accounted for to Jaynes; that the plaintiff had notified the executors that he claimed such property as part of his share of the firm property, and had requested them to account with him therefor, and to pay it over to him, or so much thereof as should on an accounting be found to belong to

him; that the executors had refused and continued to refuse to do so, justifying their refusal by the agreement for a dissolution of the partnership obtained from Jaynes by the gross and wilful fraud of Eames; and that all the partnership books and papers were in the possession and control of such executors, who, though repeatedly asked, had refused permission to the plaintiff to examine them.

The prayer of the bill was, in substance, for a cancellation of the agreement of dissolution, for the production of the firm books and papers with permission to examine and copy them, for an accounting and for the payment over of any balance found due to the plaintiff, for the conveyance to the plaintiff of his share of the property purchased by Eames with partnership funds and devised or given away by him during his lifetime without consideration, and for discovery. The defendants severally demurred to the bill, among other things, for want of equity, for multifariousness, and because of laches.

The case was heard by *Devens*, J., who overruled the demurrers, and reserved the case for the consideration of the full court.

A. E. Pillsbury, for Elizabeth B. Eames and Ida L. Nelson.

C. J. McIntire, for Ella B. Murray.

S. Bancroft, for the executors.

R. R. Bishop & G. Wigglesworth, for the plaintiff.

C. ALLEN, J. We are of the opinion that the averments of the plaintiff's bill are sufficient. The criticisms of the defendants are, in substance, that the bill does not sufficiently show that the plaintiff was entitled to one half of the assets of the firm, or that by the settlement as made he did not get one half of the assets, or that he was induced to make the settlement by false and fraudulent representations by Eames. But taking the whole bill together, it sufficiently avers a fraud which, if proved, will entitle the plaintiff to have the settlement of the partnership opened. If the plaintiff was fraudulently induced to make a division of the partnership property, by which he got less than he was entitled to, as alleged, no laches appears from the facts stated in the bill which should defeat his equitable right.

The bill contains full averments that the various defendants other than the executors and devisees of Eames took their gifts

from him without consideration; and that the money used to purchase said gifts, as well as all the property left by Eames, was property belonging to the partnership. The bill is not multifarious. The demurrers were properly overruled.

Demurrers overruled.

AMOS H. HARRIS vs. SOLOMON CARTER.

Suffolk. March 29, 30, 1888. — June 21, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Partnership — Division of Profits — Interest on Capital.

A partnership agreement was silent as to the sharing of profits and as to the allowance of interest. Each of the two partners for twelve years drew out the net earnings and more, the excess drawn out by each being nearly proportionate to the capital put in by him, and the circumstances negatived any intention to pay interest. *Held*, that the profits were to be shared equally, and that interest was not to be allowed on capital or on sums drawn out.

BILL IN EQUITY, between former copartners, for an accounting. The case was heard on the report of a master, and exceptions thereto alleged by the defendant, by *Devens, J.*, who reserved it for the consideration of the full court. The facts appear in the opinion.

H. G. Nichols, for the defendant.

G. D. Noyes, for the plaintiff.

W. ALLEN, J. The only exceptions taken to the master's report are to his findings that the profits and losses should be equally borne by the partners, and that no interest should be allowed to either partner upon capital or upon sums drawn out.

The oral agreement of copartnership specified the amount of capital to be supplied by each partner, and was silent as to almost every other particular. Nothing was said in it about sharing the profits and losses, or about interest, or about sums to be drawn out by the partners, though it was understood that each partner was to draw out what was necessary for expenses of living. The capital was about \$63,000, — \$10,000 of which

was put in by Harris, and the rest by Carter,—the services of both partners being of equal value to the firm. The partnership continued for twelve years, with no more definite agreement, each partner drawing what was needed for his personal expenses, and at its dissolution the assets were less than the amount of the capital put in. The profits referred to in the report are the amount of the net earnings so drawn out by the partners. The intention of the parties to share these profits equally is manifest.

There was no agreement that interest should be paid, and the circumstances negative such an intention. Nothing was said about it until after the dissolution of the partnership. The plaintiff had been a salesman with the firm of Carter and Wiley, of which the defendant was a member, on a salary of \$3,000, and had also the interest at seven per cent on \$10,000 which he lent to the firm, and he gave up his salary and put his money into the new partnership, from which he received upon an average less than \$2,500 a year. It was understood that the business was not profitable or prosperous. The average amount of profits was less than \$4,500 a year. The whole amount drawn out by both parties during the twelve years exceeded by more than \$8,000 the whole amount of the profits. Interest on the capital deducted from the average earnings would have left \$700 as the average annual profits. The change from clerk to partner, if interest was to be allowed on capital, would have reduced the plaintiff's income, not borrowed from capital, from \$3,700 to \$950 a year, to the corresponding advantage of the defendant. Yet the parties went on for twelve years, with the understanding that each should draw out what was necessary for his living expenses, and each in fact drew out one half of the earnings and more, the excess drawn out by each having nearly the proportion to the excess drawn out by the other that the capital put in by him bore to the capital put in by the other. The whole amount drawn out was \$64,859, which was \$8,560 in excess of the profits. Of this excess, \$7,331 was drawn out by the defendant, and \$1,229 by the plaintiff, which was nearly the proportion of the capital put in by them.

There can be no doubt that the understanding was that the parties should have a right to draw out what was necessary for

their personal expenses equally to the extent of the profits, and beyond that in the proportions of the capital put in by them respectively. If interest was not to be credited to capital, the plaintiff in fact drew out \$127.28 less, and the defendant that amount more, than they were respectively entitled to; if interest was to be allowed on capital, the plaintiff drew out, not only his own capital, but over \$6,000 that belonged to the defendant. This result must have been obvious to the parties, had their attention been given to the matter. Annual statements were made by the book-keeper to the parties, which called their attention to the matter of interest on capital, and it is incredible that the parties should have pursued the course they did without mentioning the subject, if they had not understood that interest was not to be allowed. Interest on capital never was computed or included in the annual statements, and the only reference to it in the statements was a memorandum by the book-keeper saying that interest on capital was not computed. The evidence not only fails to show an agreement that interest was to be allowed upon the capital, but affords a strong inference to the contrary.

We think that the findings of the master which were accepted to were correct, and that the account is correctly stated by him in conformity with them.

Decree for the plaintiff.

FRANCES E. GOULD vs. SLATER WOOLEN COMPANY.

Suffolk. May 5, 1888. — June 21, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Negligence — Use of Poisonous Dyes by Manufacturer.

A woollen manufacturer who uses in dyeing his cloths the most common mordant, which so far as known has never caused injury to any one merely handling cloths dyed therewith, and which he did not know or suppose, and had no reason to know or suppose, to be injurious, is not liable to a purchaser poisoned by handling the cloth.

TORT to recover for personal injuries alleged to have been caused by the negligent use of poisonous dyes by the defendant in making woollen cloths purchased and used by the plaintiff, a manufacturer of caps. Writ dated September 22, 1884.

At the trial in the Superior Court, before *Blodgett, J.*, the plaintiff's evidence tended to show that she was poisoned by using, in the ordinary course of her business, cloths manufactured by the defendant, and which she bought of its agent.

Dr. Charles Harrington, assistant chemist in the Harvard Medical School, called by the plaintiff as an expert, testified that he had made an analysis of the cloth in question, and had found in it quite a large amount of chrome compounds; that the chrome was in the cloth in an insoluble form, and that it would be hard to say what the compound was; that the cloth was mordanted by bichromate of potash in solution, and then passed through the dyeing process, so that a new compound was formed, the exact nature of which he could not tell; that bichromate of potash was the most common mordant used in dyeing woollen cloth to set the color; that all bichromate of potash was an irritant poison, and caused ulceration and more or less inflammation of the skin; that it was a well known fact that most workmen in factories where it was made had local ulcerations on the hands and nose; and that cloth dyed by bichromate of potash might be poisonous to susceptible persons. On cross-examination, he testified that bichromate of potash was very extensively used in dyeing cotton stockings black; that, so far as he knew, no cases of poisoning similar to that of the plaintiff had been published until he published four or five cases in 1886, but that since that time he had seen several more; that up to that time it had not been shown, so far as he could find out, that cases of poisoning had occurred from chrome mordanted cloth; that he did not know how poisoning could be effected from the presence of chrome compounds in cloth; and to the question, "Is there to-day anything further developed in relation to this kind of poisoning, other than that some people may be injured who have a disposition that way by the presence of this compound?" he replied, "Nothing more than occasionally persons may be injured by it, but the great majority of people not."

Upon this evidence, the judge ruled that the action could not

be maintained, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. B. Callender & L. Girardin, for the plaintiff, cited *French v. Vining*, 102 Mass. 132; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Minor v. Sharon*, 112 Mass. 477; *Smith v. Wildes*, 143 Mass. 556; *Giroux v. Stedman*, 145 Mass. 439, 443.

W. S. B. Hopkins, for the defendant.

C. ALLEN, J. The question in this case is whether there was any evidence, sufficient to go to the jury, to show that the defendant was negligent in the performance of any duty which it owed to the plaintiff, as one of the purchasers of the cloths manufactured by the defendant; and we are of the opinion that there was not. The plaintiff's action was brought on September 22, 1884. According to the testimony of the expert witness introduced by the plaintiff, it had never been shown, until 1886, that any cases of poisoning had occurred like the plaintiff's. For all that appears, the plaintiff's was the first instance of injury that ever was known to arise from the cause alleged in the declaration. All that the plaintiff showed against the defendant was, that it used an article for dyeing its cloths which was the most common mordant used in wool dyeing, which was also used very extensively in dyeing cotton stockings black, which, so far as then known, had never caused injury to anybody who merely handled the cloths, and which the defendant did not know or suppose, and had no reason to know or suppose, to be injurious; and, under these circumstances, although there was evidence tending to show that, in point of fact, the plaintiff was injured by merely handling the cloths, this was not a result which the defendant was bound or ought to have contemplated as likely to happen. The facts of the present case do not call upon us to go any further than this. See *Commonwealth v. Pierce*, 138 Mass. 165, 179, 180; *Davidson v. Nichols*, 11 Allen, 514; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64.

Exceptions overruled.

PAPER STOCK DISINFECTING COMPANY *vs.* BOSTON
DISINFECTING COMPANY.

Suffolk. March 6, 1888. — June 22, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

License under Letters Patent — Assignment — Implied Promise to pay Royalty.

The owner of a patent licensed the use of it in consideration of a royalty to be paid to him, and on condition that the license might be revoked upon non-payment, and authorized the licensee to assign the same in consideration of like payment by the assignee. The licensee assigned the license subject to all the conditions and agreements therein contained and the assignee used the patent under the license. *Held*, that the licensee impliedly promised to pay the royalty, and that his assignee by accepting the license also promised to pay the royalty to such owner.

CONTRACT to recover certain royalties for the use of a patent. Trial in the Superior Court, without a jury, before *Mason, J.*, who allowed a bill of exceptions in substance as follows.

The plaintiff introduced in evidence an instrument in writing, signed by the plaintiff alone, and dated May 12, 1885, which, after reciting that the plaintiff was the owner of letters patent for a new and useful improvement in apparatus for disinfecting baled rags and other fibrous materials, and that John W. Holmes was desirous of acquiring a license under such letters patent, proceeded as follows:

“Now, therefore, this agreement witnesseth, that for and in consideration of the sum of one dollar to it in hand paid, and of a royalty of one dollar per ton of two thousand pounds on all rags or paper stock disinfected by the use of said apparatus and process, to be hereafter and during the full term of said letters patent, and each and every one of them, and of any and all reissues thereof, well and truly paid to it by said John W. Holmes, his heirs and executors, administrators, and assigns, the said Paper Stock Disinfecting Company doth hereby license, authorize, and permit the said John W. Holmes, his heirs, executors, and administrators, and assigns, solely to make and use the said improvement in apparatus for disinfecting baled rags and other fibrous materials, and solely and exclusively to use

the said improvement in the process of disinfecting rags and other fibrous materials in bales under the said letters patent in any and all parts of the State of Massachusetts, and in no other place or places. To have and to hold the license hereby granted to the said John W. Holmes, his heirs, executors, administrators, and assigns, as a license only, and under the conditions and limitations hereinbefore expressed, to the full end of the term for which the said letters patent are or may be granted.

"And the said John W. Holmes, for valuable consideration, hereby covenants and agrees, for himself, his heirs, executors, administrators, and assigns, to and with the said Paper Stock Disinfecting Company, its successors and assigns, that the entire license, authority, and permission hereby granted shall cease and be of no force or effect, but be totally revoked and cancelled, unless he or they shall well and truly account for and pay over to the said Paper Stock Disinfecting Company, its successors and assigns, one dollar per ton of all rags or paper stock disinfected by him or them from the use of said new and useful improvements, and of each thereof, in any and all parts of the State of Massachusetts, such royalty to be accounted for and paid over as often as once every three months, and full and correct accounts to be kept of all rags or paper stock disinfected; and in case said John W. Holmes, his heirs, executors, administrators, or assigns, shall at any time neglect or refuse to pay over the said royalty of one dollar per ton as aforesaid within fifteen days after written notice requiring such payment, it shall be lawful for said Paper Stock Disinfecting Company, its successors and assigns, to file in the Patent Office a revocation of this license, and the same shall thereupon be revoked, and shall cease and determine, anything hereinbefore contained to the contrary notwithstanding."

The plaintiff also introduced in evidence another instrument in writing, signed by Holmes alone, and dated July 9, 1885, which, after reciting the ownership of the letters patent by the plaintiff and the above license to Holmes, stated that the Boston Disinfecting Company was desirous of acquiring the license, and of engaging in the business of manufacturing, using, and selling the patented apparatus, and of making and using the process and concluded as follows: "Now, therefore, I, John W. Holmes,

party of the first part, for, and in consideration of the sum of sixty thousand dollars lawful money of the United States, to me in hand paid by the said Boston Disinfecting Company, party of the second part hereto, by issuing to me at par six hundred shares of its capital stock, the receipt of which is hereby acknowledged, have assigned, sold, and set over, and do hereby sell, assign, convey, transfer, and set over, unto the said party of the second part, the said license and all my estate, right, title, and interest therein and thereto, and to all the estate, rights, powers, and privileges thereby given, granted, or conferred. To have and to hold the same unto the said party of the second part, its successors and assigns, as fully to all intents and purposes as I might have or hold the same if these presents were not executed; subject, however, to the limitations, conditions, stipulations, covenants, and agreements therein contained."

It was admitted by the defendant, that it had disinfected by the steam process mentioned a number of bales which, at one dollar per ton of two thousand pounds, would amount to the sum claimed to be due; but the defendant did not admit any liability to pay such sum, or any sum, to the plaintiff.

Upon this evidence, the defendant requested the judge to rule that the plaintiff could not maintain the action, but the judge refused so to rule, and found for the plaintiff; and the defendant alleged exceptions.

C. A. Prince, for the defendant.

1. The form of the action is implied assumpsit, and it is essential, to entitle the plaintiff to maintain his action, that privity of contract should be established between the parties. *Carter v. Gault*, 18 Pick. 531. *Ladd v. Rogers*, 11 Allen, 209. *Hills v. Snell*, 104 Mass. 173. *New York & New England Railroad v. Sanders*, 134 Mass. 58. No such privity is established in the present case, and the facts do not support an implied assumpsit.

No contract will be implied in addition to an express contract. *Brown v. Fales*, 139 Mass. 21, 28. 1 Chit. Con. (11th Am. ed.) 89. No contract will be implied against the express declaration of a person upon whom no duty is imposed by law. *Earle v. Coburn*, 130 Mass. 596. So no contract will be implied where no such contract is plainly intended.

The instrument, though called a license, is really a grant of an undivided interest in the patent, since it gives the sole and exclusive right to use the process in a specified section or territory, to the exclusion of every one else. *Curtis on Patents*, § 212. *Walker on Patents*, § 287. *Potter v. Holland*, 4 Blatchf. 206, 211. The subsequent provisions merely make the title of Holmes terminable upon the non-payment of royalty, and the assignment by Holmes also looks to the power of revocation contained in the license to him as a means of enforcing the payment of the royalty without any such promise.

2. If any promise by the defendant can be implied to pay for the use of the process, it can only be implied to Holmes, and through him to the plaintiff. In this aspect the plaintiff stands in the position of a person for whose benefit a promise has been made, and who is a stranger to the consideration, and he must bring himself within the rule laid down by Gray, C. J., in *Exchange Bank v. Rice*, 107 Mass. 37, 41. See *Rogers v. Union Stone Co.* 130 Mass. 581; *Morse v. Adams*, and *Clement v. Earle*, 130 Mass. 585, note. The plaintiff comes within none of the exceptions to this rule. *Brewer v. Dyer*, 7 Cush. 337, where a lessor was allowed to maintain an action for rent against a party who had promised the lessee of a shop in writing to take his lease, which was under seal, and pay the rent to the lessor according to its terms, is probably no longer law in this Commonwealth. See *Exchange Bank v. Rice*, 107 Mass. 43; *Taylor, Land. & Ten.* (7th ed.) § 155, note.

A patent right is personal property. *Shaw Relief Valve Co. v. New Bedford*, 19 Fed. Rep. 753. If a man leases personal goods, and the lessee covenants for himself and his assigns to pay the rent, and then assigns, the covenant does not bind the assignee, as a contract cannot be annexed to goods so as to follow the property in the goods, either at common law or in equity. *Spencer's case*, 1 Smith's Lead. Cas. (8th ed.) 68, 103. *Pollock, Con.* (Wald's ed.) 224. See *Wilde v. Smith*, 8 Daly, 196, 202.

3. No promise can be implied from the fact that the defendant had the use of the process. *Hills v. Snell*, 104 Mass. 173. *Boston Ice Co. v. Potter*, 123 Mass. 28. The right to use the process had been parted with to Holmes, and the defendant was not using the plaintiff's property.

4. If any contractual relation can be said to exist between the plaintiff and defendant, it must grow out of the assignment of the use of the process to the defendant through Holmes, who had been licensed by the plaintiff. The license or grant is, however, still in force, the plaintiff not having exercised its right to revoke it. The plaintiff's remedy, if it has any, must therefore be on such express contract, and not in *assumpsit*; for the law is clear, that, where an express contract still remains open, the remedy is on it, and the plaintiff cannot recover on an implied contract. *Moulton v. Trask*, 9 Met. 577. *Fitzgerald v. Allen*, 128 Mass. 232. *Chesapeake & Ohio Canal Co. v. Knapp*, 9 Pet. 541, 565. *Hawkins v. United States*, 96 U. S. 689, 697.

J. R. Reed, for the plaintiff.

W. ALLEN, J. The license was by deed poll to "John W. Holmes, his heirs, executors, administrators, and assigns," in consideration of the one dollar in hand paid, "and of a royalty of one dollar per ton" on all rags disinfected by the use of the invention, "to be hereafter and during the full term of said letters patent . . . well and truly paid to it by said John W. Holmes, his heirs and executors, administrators, and assigns." There was added a condition in the form of a covenant by Holmes, his representatives or assigns, that, if they did not account for or pay the royalty, the license should be of no force or effect, and might be revoked. Holmes subsequently by deed poll assigned the license to the defendant, "subject, however, to the limitations, conditions, stipulations, covenants, and agreements therein contained." The action is brought to recover royalties which have become due from the use of the patent by the defendant.

The first objection is, that there is no agreement or promise to pay the royalties; that the plaintiff's only remedy to enforce their payment is to revoke the license for breach of the condition. The license was expressed to be given in consideration of payments to be made by Holmes, and its acceptance by him raised an implied promise by him to pay the consideration. *Pike v. Brown*, 7 Cush. 133. *Locke v. Homer*, 131 Mass. 93, and cases cited. The other objection is, that there is no privity of contract between the plaintiff and the defendant. We think this objection cannot be sustained.

The plaintiff had the exclusive right to permit the use of the invention by others. It might permit the use by Holmes personally, or by him and such persons as he should designate. The license was to him and to any person whom he might substitute for himself as assignee. An assignee of Holmes would use the invention by permission of the plaintiff, and under its license. *Bower v. Hodges*, 13 C. B. 765. The assigns of Holmes are designated as licensees, and are named as parties who are to pay the consideration and perform the condition. The obvious meaning of the instrument is, that the consideration shall be paid, and the conditions performed, by the party who shall use the invention under the license by the original licensee when it is used by him, and by the assignee, the substituted licensee, when he becomes a party. It provides for licensing assignees, in consideration of a royalty to be paid by them to the licensor, as truly as it licensed Holmes in consideration of a royalty to be paid by him, and a promise by the assignee to the licensor to pay the consideration is implied from the acceptance of the license by the assignee, as a promise by the original licensee is implied from the acceptance by him.

The question does not arise whether the assignee would have been bound by the covenants of the licensee if he had executed the instrument of license with covenants. No question in regard to maintaining an action upon a promise made to a third person is involved. The proposition that a person receiving property from an owner who holds it subject to a condition to pay money to a third person comes under obligation to the third person to pay the money to him, does not fully express the liability of the defendant. The case may be stated thus. An owner of a patented invention licenses A. to use the invention in consideration of a royalty to be paid to the licensor, and on condition that the license may be revoked if the royalty shall not be paid, and authorizes A. to assign the license in consideration of the payment of the royalty by the assignee to the licensor. A. assigns the license to B. subject to all the conditions and agreements therein contained, and B. uses the invention under the license. By accepting the assignment, B. must be held to have accepted the license, and promised the licensor to pay the royalty to him. *Goodyear v. Congress Rubber Co.* 3 Blatchf. 449.

See *Felch v. Taylor*, 18 Pick. 133; *Maine v. Cumston*, 98 Mass. 317; *Swasey v. Little*, 7 Pick. 296; *Brewer v. Dyer*, 7 Cush. 337; *Exchange Bank v. Rice*, 107 Mass. 37, 42; *Barney v. Newcomb*, 9 Cush. 46; *Lowry v. Adams*, 22 Vt. 160.

Exceptions overruled.

WILLIAM S. DEXTER & another vs. CHARLES E. INCHES
& others.

Suffolk. March 30, 1888. — June 22, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Devise in Trust — "Issue" construed to mean Children.

A testator, by his will, gave the residue of his property in equal shares to eight children, and provided that, in case of the decease of either, leaving issue, before receiving a share, "such issue shall represent and take the parents' share." Seven of the children were to take their shares outright, but the share of one son was put in trust, such share to go at his decease, if he left no widow, to his "issue," without more. The son died leaving no widow, but leaving three children, and also grandchildren and great-grandchildren, descendants of two of the three children. *Held*, that the son's children were entitled to his share, to the exclusion of his more remote descendants.

HOLMES, J. This is a bill, brought by trustees under the will of Henderson Inches, for instructions as to who are the parties entitled under a clause leaving one eighth of the residue in trust for the testator's son Charles for life, and then proceeding as follows: "At and after the decease of said Charles, if he shall leave a widow and issue, the income of said fund shall be paid, one moiety for the use of the relict of said Charles, and the other moiety to his issue during the life of such relict. If said Charles shall leave no widow, and shall leave issue, then at his decease the principal or capital sum shall be paid and distributed equally to and among the issue of said Charles; and if said Charles shall die leaving a widow and no issue, then the widow shall enjoy the whole income during her life. If at the decease of said Charles and his widow, if one shall survive him, there shall be no issue of said Charles then living, the principal sum or trust fund shall go to my other children in equal parts or shares."

Charles died leaving no widow, but leaving three children, and also grandchildren and great-grandchildren, descendants of two of these three children; and the question is whether the grandchildren and great-grandchildren are entitled to share with the children from whom they are descended.

The testator gave the residue of his property to his eight children in equal shares, seven of them taking their shares outright, but Charles's share being put in trust for him by a subsequent clause, with the above recited limitation over, which we have to construe. The will further provides that, "in case of the decease of either or any of my children before the receipt of his or her share, leaving issue him or her surviving, such issue shall represent and take the parents' share."

The general scheme of the will, then, was one of equal division, in which the issue of any of the other seven children who died intestate would have taken by way of representation, and the issue of any child, including Charles, would have taken by way of representation, if that child had died "before the receipt of his share."

However the English courts would construe the word "issue," in the clause before us, occurring in such a will, we cannot bring our minds to doubt that the testator intended issue to take in a representative or quasi-representative way, and we think that the intention fairly appears from the will itself, in the circumstances to which we have adverted. The difficulty which was felt by Lord Loughborough, in *Freeman v. Parsley*, 3 Ves. 421, in finding a medium between total exclusion of grandchildren and the admission of them to share with their parents, does not strike us as insuperable, supposing that he would have felt it in such a case as this. Nor do we think that a difficulty in stating a conclusion justifies a construction which the language used, as well as the probabilities, show to be contrary to what the testator could have meant.

Undoubtedly "issue" may mean, and in this clause does mean, more than children. If one child of Charles had died at any time leaving children living at Charles's death, we will assume that they would not have been excluded. See *Ralph v. Carrick*, 11 Ch. D. 873, 882. But "issue" is a word which lends itself very easily to the expression of representation. *Ross v. Ross*, 20

Beav. 645. *Robinson v. Sykes*, 23 Beav. 40, 51. *In re Orton's trust*, L. R. 3 Eq. 375, 380. The issue of Charles would have taken by way of representation in one event. If Charles had died "before the receipt of his share," his issue would have "represented" him by the words of the will. There is no reason for issue (the same word) taking the same sum otherwise than by way of representation in the other event, which has happened. If the context of the clause which we have to construe does not of itself show clearly in what sense the testator used the word, the alternative limitation makes it plain. We are of opinion that the word "issue," as here used, means descendants taking by way of representation. What the principle of division would have been had there been no descendants alive nearer than grandchildren, we need not discuss. Possibly in that case each grandchild would have formed a new *stirps*, after the analogy of the statutes. Pub. Sts. c. 125, § 1, cl. 1. See further *King v. Savage*, 121 Mass. 303; *Hall v. Hall*, 140 Mass. 267; *Bowers v. Porter*, 4 Pick. 198, 208, 210, 211. See also construction of Rev. Sts. c. 62, § 24, (Pub. Sts. c. 127, § 23,) in *Tillinghast v. Cook*, 9 Met. 143, 148. *Decree for the children.*

R. H. Gardiner, for the children.

R. F. Sturgis, for the grandchildren and great-grandchildren.

**JAMES H. BAILEY & others vs. CHARLES P. HEMENWAY
& others.**

Suffolk. January 26, 27, 1888. — June 23, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

*Sale of Lands — Oral Agreement — Statute of Frauds — Resulting Trust —
Foreign Parties — Jurisdiction.*

If a person agrees orally with three others to buy land on joint account, each to have one quarter interest in it, and all contributing unequal amounts towards the purchase money, and such person in violation of the agreement procures from the owner of the land a bond for the conveyance of two fifths thereof to himself and of one fifth to each of the others, no resulting trust will attach to such two fifths in favor of the others.

MORTON, C. J. The bill in this case, as amended, proceeds against the defendant Sullivan alone, upon the ground that the three plaintiffs and Sullivan, all of whom were residents of Maine and partners, entered into an agreement that they would buy certain land and other property in that State, that each was to have an interest of one quarter in the purchase, and that the defendant came to Boston, and, in violation of the agreement, procured a bond from the owners of the land and property, conditioned that they should convey the same, one fifth to each of the plaintiffs and two fifths to the defendant; and it alleges that the plaintiffs respectively furnished money and credits requisite for making said purchase in the proportion of one fourth each. The prayer is, that the court decree that the defendant holds one twentieth of the said two fifths interest which he has under said bond as the trustee and for the sole benefit of each of the plaintiffs. The defendant pleads the statute of frauds, alleging that the subject of the agreement was principally land, and that the alleged agreement was not in writing and there was no memorandum or note thereof in writing, and denying that the plaintiffs furnished each one quarter of the money and credits necessary for the purchase. The master to whom the case was referred has found that an oral agreement was made substantially as alleged in the bill, and that it was not reduced to writing, and no memorandum or note thereof in writing was signed by the defendant, and that the property purchased was principally land.

The statutes of Maine, like those of this Commonwealth, provide that no action shall be maintained upon any contract for the sale of lands, or any interest in or concerning them, unless the contract or some memorandum thereof is in writing and signed by the party to be charged; and that there can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney.

It is clear that the agreement in question, as it relates principally to land, is within the statute of frauds, and that no trust in the land, or in the equitable title acquired by the defendant under the bond, can be enforced against him, unless there is a trust arising or resulting by implication of law. The doctrine

in regard to resulting trusts is settled by numerous decisions, a few only of which need be referred to. When the money for the purchase of land is paid or furnished by one person, and the deed is taken in the name of another, there is a resulting trust created by implication of law in favor of the former. It is also true, that when one person pays the money for a specific share, an aliquot part of the land, such as one half or one quarter, or other fixed fraction of the whole, and the title to the whole is taken in the name of another, a trust results in favor of the former for such aliquot part. But a general contribution of a sum of money towards the entire purchase is not sufficient to produce this result. When, therefore, one makes an oral contract with another that the latter shall buy land, on joint account, and he in violation of the contract takes the deed to himself, no trust results in favor of the former as to one half of the land, unless it is shown that he furnished the money for the one half, — in other words, that it was bought with his money. *McGowan v. McGowan*, 14 Gray, 119. *Fickett v. Durham*, 109 Mass. 419. *McDonough v. O'Neil*, 113 Mass. 92. *Parsons v. Phelan*, 134 Mass. 109. *Collins v. Sullivan*, 135 Mass. 461. *Dudley v. Bachelder*, 53 Maine, 403. *Smith v. Burnham*, 3 Sumner, 435.

These principles are decisive of the case at bar. The plaintiffs and the defendant entered into an agreement that the latter should purchase the land in question on their joint account, each to have one quarter interest in the purchase. There was no written contract and no memorandum in writing signed by the defendant. He took a bond for a deed of the land, by which he was to have two fifths and each of the plaintiffs was to have one fifth. There being no memorandum in writing, no trust can arise or be attached to the two fifths held by the defendant, unless the facts show a resulting trust by implication of law. To produce this result, it must appear that each of the plaintiffs contributed and furnished one quarter part of the money and credits paid for the bond. The master has stated in detail the manner in which the defendant raised the money and credits necessary to procure the bond. Without going into particulars, it is enough to say that it was not obtained by each of the parties paying or furnishing an aliquot fourth part. The plaintiffs

each made a general contribution for the purpose, varying in amount; the defendant contributed part and raised a part by a mortgage of his personal property, and a part was furnished by the firm of which the parties are members. Upon no aspect of the evidence can it be held that each contributed a quarter part of the purchase money, so that the plaintiffs can claim that it was their money and credits, in the proportion of one quarter each, which purchased the land or the bond.

The fact that they afterwards offered to equalize the payments, or, as the master states, "to indemnify and reimburse Sullivan any contribution he had made in excess of one fourth," is of no avail, except as evidence that one fourth had not been furnished by each. A resulting trust depends upon the fact that the money of the person claiming it was used in the purchase, and it cannot be raised by any future payments or tender. The trust, says Chancellor Kent, results from the original transaction at the time it takes place, and at no other time, and it is founded on the actual payment of the money, and on no other ground. It cannot be mingled or confounded with any subsequent dealings whatever. *Botsford v. Burr*, 2 Johns. Ch. 405. *Richards v. Manson*, 101 Mass. 482.

We are, for these reasons, of opinion that there was no trust resulting by implication of law upon which this bill can be maintained. In view of the result we have reached, the defendant's claim that, this being a case of foreign parties litigating respecting land in another State, the court ought in its discretion to refuse to entertain jurisdiction, need not be discussed at length. There is no doubt that the court has jurisdiction, and as the case has been fully heard, we have deemed it best to decide it upon its merits.

Bill dismissed.

E. R. Hoar & T. H. Talbot, for the plaintiffs.

W. G. Russell & J. B. Richardson, for the defendant.

ALFRED S. LAZARUS & others vs. WALTER S. SWAN.

Suffolk. March 6, 7, 1888. — June 23, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Sale on Consignment — Equitable Assignment — Express Promise by
Consignee to pay Creditor.*

A consignor of a cargo of goods for sale on commission directed the consignee by letter to pay over the net proceeds to a creditor, to whom the consignor also wrote on the same day that the consignee "has instructions to place in your hands the net proceeds of said cargo as soon as possible." The creditor thereupon wrote to the consignee, asking whether the latter would accept his draft against the shipment, to whom the consignee replied, that he would not accept such a draft but "will give you proceeds of sale as soon as in hand." Meantime the consignor wrote to the consignee as well as to the creditor that the instructions were revoked, and informing the consignee that he himself had drawn against the consignment, whereupon the consignee also wrote to the creditor of such revocation. The creditor did not give the consignor any new credit, or change his position towards him during the time covered by the correspondence; and the consignee applied the net proceeds of the cargo to the payment of the consignor's draft, leaving a balance due him from the consignor. *Held*, that the consignee made no express promise to pay such proceeds to the creditor, and that there was no equitable assignment thereof by the consignor imposing upon him the duty of holding them for the creditor's benefit.

CONTRACT, by the plaintiffs, doing business in New York under the style of A. S. Lazarus and Company, to recover the proceeds of a cargo of molasses consigned to the defendant by Daubon and Company, of Porto Rico, who were indebted to the plaintiffs. The case was submitted to this court on an agreed statement of facts, the material part of which appears in the opinion.

J. E. Leach & F. E. Farnham, for the plaintiffs.

The doctrine of an equitable assignment is briefly stated in *Griffin v. Weatherby*, L. R. 3 Q. B. 753, by Blackburn, J., at p. 758, as follows: "Ever since the case of *Walker v. Rostron*, it has been considered as settled law that where a person transfers to a creditor, on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the

debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise."

The order to pay, or assignment of the debt, cannot be revoked after it has been accepted by the holder of the fund. *Hodgson v. Anderson*, 3 B. & C. 842. *Robertson v. Fauntleroy*, 8 J. B. Moore, 10. There is a good consideration for the defendant's promise to pay the plaintiffs. *Walker v. Rostron*, 9 M. & W. 411. *Fruhling v. Schroder*, 2 Scott, 185. *Crowfoot v. Gurney*, 9 Bing. 372. The defendant's promise makes an agreement to pay a debt of his own, and not of another, and is not within the statute of frauds. *Wyman v. Smith*, 2 Sandf. 331. The fact that the amount covered by the assignment is not ascertained, does not affect the question. *Fruhling v. Schroder*, *ubi supra*. *Crowfoot v. Gurney*, *ubi supra*. The agreement cannot be altered without the consent of all parties. *Walker v. Rostron*, *ubi supra*. From the above cases, it appears that a direct privity is established by the acceptance of the order and promise to pay, and the defendant thereupon becomes primarily liable to the plaintiff. See also 2 Chit. Con. (11th Am. ed.) 913, 1375 and note *i*, 1379, 1380, and notes. The English doctrine has been universally followed in America in numerous cases. See *Christmas v. Russell*, 14 Wall. 69, 84; *Wyman v. Smith*, 2 Sandf. 331; *Tripp v. Brownell*, 12 Cush. 376, 380.

R. D. Smith, for the defendant.

MORTON, C. J. Daubon and Company, on June 19, 1885, shipped from Porto Rico, by the brig Hyaline, a cargo of molasses consigned to the defendant, at Boston, for sale on commission on their account. On June 23, 1885, they wrote to the defendant a letter, enclosing a bill of lading of the shipment, and adding, "On the safe arrival with you of the above-mentioned vessel, we would thank you to be very active in placing the cargo, if it is suited to the market, and the net proceeds resulting you will please hand to Messrs. A. S. Lazarus and Company of New York, to whom we have written by the same mail, informing them that you would remit them for our account the sum resulting from the sale of the molasses." On the same day

they wrote a letter to the plaintiffs, enclosing a duplicate bill of lading, in which they state that the defendant "has instructions to place in your hands the net proceeds of said cargo as soon as possible." This letter was received by the plaintiffs on July 6, 1885.

Daubon and Company, on July 5, 1885, wrote a letter to the defendant, stating that they had drawn on him two drafts on account of the molasses shipped to him, one of which, for \$5,000, was expressed to be drawn against the cargo of the *Hyaline*, which letter contained the instruction: "You will please suspend our order to remit to A. S. Lazarus and Company, of New York, the net proceeds of the cargo per *Hyaline*, and in due time we will telegraph you what to do to reimburse the above-named gentlemen." On the same day, July 5, they wrote to the plaintiffs that they had "given orders to Mr. Swan, of Boston, not to send you any funds until he shall receive our advice by cable." It does not appear when these last letters were received, but by the ordinary course of the mails it would take a letter from ten to fourteen days to reach Boston from Porto Rico, and one day less to reach New York.

On July 7, 1885, the plaintiffs wrote to the defendant, informing him that they had received the letter of June 23, 1885, from Daubon and Company, and adding: "Doubtless by now you have received the invoice and bill of lading. We should like to hear for what amount and at what date you would accept a draft of ours against said shipment, Messrs. Daubon and Company having sent you the bill of lading, clear, and without having drawn against the same." To this the defendant replied on the next day, "We have received from Messrs. Daubon and Company the shipping documents of cargo molasses per *Hyaline*, with instructions concerning disposal, and to remit net proceeds of sale to you, which we shall do in due course, possibly remitting you an account as collections are made, should the entire cargo not be closed out promptly." On July 9, 1885, the plaintiffs again wrote the defendant, asking, "If you are willing to accept a draft of ours at thirty or sixty days for an amount, say of \$3,000 or \$4,000, on account of proceeds." To this, on July 10, 1885, the defendant replied, "Yours of yesterday received, and, in reply.

would say that we should not accept your drafts as suggested by you, but will give you proceeds of sale as soon as in hand."

On July 15, 1885, the defendant, having received Daubon and Company's letter of July 5, 1885, wrote to the plaintiffs as follows: "We have later advices from Messrs. Daubon and Company, informing us of having made drafts upon us for proceeds Hyaline cargo molasses, and cancelling instructions to pay same to you." Some subsequent correspondence ensued between the parties, the plaintiffs claiming that the defendant was liable to them, and the defendant denying his liability, which it is not necessary to refer to more particularly. It is admitted that the plaintiffs did not give Daubon and Company any new credit, or change their position towards Daubon and Company, between June 19 and July 18, 1885; and that the net proceeds of the cargo of the Hyaline and of other cargoes were applied by the defendant to the payment of Daubon and Company's drafts upon him, leaving a balance due from Daubon and Company to him of \$789.61.

Upon this state of facts, it is clear that there is no express promise by the defendant to pay the proceeds of the cargo of the Hyaline to the plaintiffs, upon which they can rely. The letters of the defendant do not contain words of promise or agreement, but merely notify the plaintiffs of the instructions he has received from Daubon and Company, and his intention to carry out his instructions. Besides, there is no consideration for such promise shown. *Rogers v. Union Stone Co.* 130 Mass. 581. *Clement v. Earle*, 130 Mass. 585, note.

But the plaintiffs rely upon the ground that the transaction amounted to an equitable assignment to them by Daubon and Company of the proceeds of the cargo of the Hyaline, and that, when the defendant received such proceeds, he, having been notified of the assignment, was bound to account to them. The doctrine of equitable assignments is well settled. If a person transfers to a creditor, on account of a debt, a fund in the hands of a third person, and the holder of the fund is notified of the transfer, he is bound, if he has no prior claim upon the fund, to hold it in trust and for the benefit of the creditor, who may enforce his claim in equity, or at law if the holder promises to

pay them. *Griffin v. Weatherby*, L. R. 3 Q. B. 753. *Tripp v. Brownell*, 12 Cush. 376. Story Eq. Jur. § 1041 *et seq.*

But there must be an assignment by the owner of the fund, that is to say, a transfer or appropriation of the fund to the creditor's use. For instance, if in this case the consignors of the molasses had drawn and sent to the plaintiffs an order upon the defendant to pay the fund to the plaintiffs, and he had been notified of it, he would have been liable in some form of action to the plaintiffs, as such an order is in its nature a transfer of the fund, and as he has no prior claims which could prevent the consignors from assigning it. But the difficulty with the plaintiffs' case is, that the evidence does not show any assignment or transfer of the fund to them. The only evidence upon which they rely as showing an assignment is the statement in the letter of June 23, 1885, from Daubon and Company, that the defendant "has instructions to place in your hands the net proceeds of said cargo as soon as possible." This is not an order on the defendant, nor an assignment of the fund. It cannot be held to have this effect without greatly enlarging the natural meaning of the language. It does not purport to convey the fund to them in payment of or as security for their debt. We cannot infer from the language used, or from the circumstances that it was the intention of Daubon and Company to set apart and appropriate the fund to the use of the plaintiffs. The language does not import this, and we cannot, by any fair construction, give it this meaning. We are therefore of opinion, that the plaintiffs fail to show an equitable assignment to them.

In this view of the case, it is not necessary to consider the other questions argued by the counsel.

Judgment for the defendant.

ISAAC HECHT & others vs. ALFRED H. BATCHELLER
& another.

Suffolk. March 16, 1888. — June 23, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Contract of Sale — Promissory Note — Insolvency of Maker — Mistake —
Failure of Consideration — Warranty by Broker — Usage.*

The owner of a promissory note sold it through a broker shortly after the maker made an assignment for the benefit of creditors, neither seller, nor buyer, nor broker knowing that fact, but all supposing that he was still doing business; and it was agreed that such sales through brokers "are confined to the paper of persons actually carrying on business, in other words it is the universal custom of such brokers not to offer for sale the paper of any person whom they have reason to believe to have failed or made an assignment." *Held*, that there was no such mistake as to the subject matter of the sale as to avoid the contract, and that there was no implied warranty that the note was that of a solvent firm.

CONTRACT for money had and received. At the trial in the Superior Court, without a jury, before *Mason, J.*, the following facts were agreed.

On or about November 1, 1886, the defendants, composing a firm of boot and shoe manufacturers in Boston, sold to J. and S. B. Sachs of Cincinnati, Ohio, certain boots and shoes, and received in payment from that firm a promissory note, dated November 3, 1886, and signed by it. The defendants, in the usual course of business, placed the note with a firm of brokers in commercial paper, with directions to sell it, and such brokers, at about one o'clock P. M. on November 27, 1886, sold the note to the plaintiffs, who had been in the habit of buying commercial paper, including that of J. and S. B. Sachs. Neither the defendants nor any one in their behalf indorsed the note, or made any representations in respect thereof, other than such as may be implied or inferred from the facts stated. Neither the plaintiffs, nor the defendants, nor the brokers, had at the time of the sale of the note any knowledge about the solvency or insolvency, or the continuance in business, of the makers of the note, further than what was known generally to the business community of Boston at the time, and both the plaintiffs and defendants knew

the financial standing of J. and S. B. Sachs as given by the mercantile agencies.

About two hours before the sale of the note to the plaintiffs, the firm of J. and S. B. Sachs failed, and made a voluntary assignment of all their assets for the benefit of their creditors, to be administered under the insolvent laws of Ohio, which assignment was duly recorded. J. and S. B. Sachs at the making of the assignment ceased to do business, and have not since resumed business, being able to pay only a percentage upon their debts. At the time of the sale of the note, no one of the defendants, nor any one of the plaintiffs, nor the brokers, knew, or had any reason to believe, that J. and S. B. Sachs had failed or made an assignment, or ceased to do business; but, on the contrary, they all supposed or believed that the firm was then doing business at Cincinnati as theretofore. The business of buying and selling business commercial paper is an extensive one in Boston, and is largely conducted through brokers. The transactions in commercial paper so conducted through brokers, including the brokers in question, are confined to the paper of persons actually carrying on business; in other words, it is the universal custom of such brokers not to offer for sale the paper of any person whom they have reason to believe to have failed or made an assignment. The plaintiffs would not have purchased the note if they had known that J. and S. B. Sachs had failed or made an assignment, nor would the defendants or the brokers, if they had known of the failure, have sold it to the plaintiffs without disclosing the fact to the plaintiffs, unless it appeared that they already knew it.

The parties, about two hours after the sale of the note, learned for the first time that J. and S. B. Sachs had failed, and immediately thereafter offered to return the note to the defendants, and demanded a return of the money paid by them therefor, claiming that the money had been paid under a mistake; but the defendants declined to take back the note and repay the money, claiming that there was no mistake, and that the sale was valid. Between the time that the note was delivered to the plaintiffs and the time that they offered to return it to the defendants, there was no change in the affairs of J. and S. B. Sachs, or of the parties to this action, which would prevent their

being restored to the same position that they were in before the sale, other than as stated. Subsequently the plaintiffs delivered the note in question to J. and S. B. Sachs, upon part payment thereof.

The case was submitted to the court upon such of the above facts as were legally relevant or material, with a right to draw such inferences as a jury might draw therefrom; and if, upon such facts as are material and relevant, and the inferences therefrom drawn, the court was of opinion that the plaintiffs were entitled to recover, judgment was to be entered for them for the balance due on the note; otherwise, for the defendants.

The defendants requested the judge to rule as follows: "1. Upon the agreed facts, judgment should be for the defendants in this action. 2. From the agreed facts as stated, there are no inferences of further facts which the court or jury could or ought to draw. 3. If the court finds that neither the plaintiffs nor the defendants at the time of the sale of the note spoke of, or inquired about, or knew anything relative to the then continuance in business of the makers of the note, and that during the transaction the plaintiffs and defendants both stood upon an equal footing, judgment should be for the defendants."

The judge refused so to rule, but ruled as follows: "1. If the court finds that the defendants, through their agents, sold the note to the plaintiffs, as and for the note of a firm then doing business, and not as the note of a firm which had already failed, the plaintiffs are entitled to recover. 2. If the court finds that the defendants intended to sell, and supposed they were selling, and the plaintiffs intended to buy, and supposed they were buying, the note of a firm then carrying on business, and not the note of a firm which had already failed and made an assignment, the plaintiffs are entitled to recover. 3. If the court finds that, under the circumstances of the sale, the note was warranted as being the note of a firm then doing business, and not the note of a party that had failed or made an assignment, the plaintiffs are entitled to recover. 4. If the court finds that, under the circumstances of the sale, the note was represented as being the note of a firm then carrying on business, and not the note of a party that had failed or made an assignment, the plaintiffs are entitled to recover."

The judge found for the plaintiffs; and the defendants alleged exceptions.

T. B. King, for the defendants.

L. D. Brandeis, for the plaintiffs.

MORTON, C. J. The defendants, being the owners of a promissory note which they had taken in the ordinary course of business, sold it through brokers to the plaintiffs. It was afterwards ascertained that, two hours before this sale, the makers of the note had made a "voluntary assignment of all their assets for the benefit of their creditors, to be administered under the insolvent laws of Ohio," of which State they were residents. Neither of the parties to this suit, nor the brokers employed by the defendants, knew of the assignment at the time of the sale, but they all supposed that the makers were doing business as theretofore. The plaintiffs contend that they are entitled to recover upon either of two grounds: first, that there was a mutual mistake of the parties as to the thing sold, and therefore no contract was completed between them; and, secondly, that there was a warranty, express or implied, by the defendants, that the makers of the note were then carrying on business, and had not failed or made an assignment.

1. It is a general rule, that, where parties assume to contract, and there is a mistake as to the existence or identity of the subject matter, there is no contract, because of the want of the mutual assent necessary to create one; so that, in the case of a contract for the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or, if he receives it, may upon discovery of the mistake return it, and recover back the price he has paid. But to produce this result the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold. *Gardner v. Lane*, 9 Allen, 492. *Gardner v. Lane*, 12 Allen, 89. *Spurr v. Benedict*, 99 Mass. 463. *Bridgewater Iron Co. v. Enterprise Ins. Co.* 134 Mass. 433. Benjamin on Sales, § 54.

In the case at bar, the subject matter of the contract was the note of J. and S. B. Sachs. The note delivered was the same

note which the parties bought and sold. They may both have understood that the makers were solvent, whereas they were insolvent; but such a mistake or misapprehension affects the value of the note, and not its identity. *Day v. Kinney*, 131 Mass. 37. In *Day v. Kinney*, the makers of the note sold were in fact insolvent, but they had not stopped payment or been adjudged insolvent, and the decision is confined to the facts of the case. But we think the same principles apply in this case. The makers of the note had made an assignment for the benefit of their creditors, but this did not extinguish the note, or destroy its identity. It remained an existing note, capable of being enforced, with every essential attribute going to its nature as a note which it had before. Its quality and value were impaired, but not its identity. The parties bought and sold what they intended, and their mistake was not as to the subject matter of the sale, but as to its quality. We are therefore of opinion, that the sale was valid, and that the plaintiffs cannot recover the amount they paid, as upon a failure of consideration.

2. The other question is one of some difficulty, created in part by the manner in which the case is brought before us. The case was submitted to the Superior Court upon an agreed statement of facts, "with a right to draw such inferences as a jury might draw therefrom." The court found for the plaintiffs, but upon what ground does not appear. If upon the facts stated, and any inferences of fact which the court might reasonably draw therefrom, its finding can be justified, this court cannot revise its finding. *Old Colony Railroad v. Wilder*, 137 Mass. 536.

When a man sells a note, the law implies a warranty that it is genuine, and that he has such a title as to give him the right and power to sell it. *Lobdell v. Baker*, 1 Met. 193. *Cabot Bank v. Morton*, 4 Gray, 156. *Merriam v. Wolcott*, 3 Allen, 258. This is upon the ground that the offer of the note is in itself a tacit affirmation or representation that it is genuine, and that the proposed seller has a right to sell it, and from such affirmation the law implies a warranty, which enters into the contract. But it is settled that he does not warrant the solvency of the maker. *Day v. Kinney*, *ubi supra*. *Burgess v. Chapin*, 5 R. I. 225. *Beckwith v. Farnum*, 5 R. I. 230. Applying these

principles to this case, if the brokers who acted for the defendants at the time of the sale made any express or tacit representations that the note was a note of a firm then in business, which the parties understood as forming part of the contract, and the plaintiffs relied upon it, it might, in law, amount to a warranty that the note was as they affirmed it to be. But the difficulty of the plaintiff's case is, that there was no warranty in terms, and there are no facts agreed which justify an inference that the parties intended any such warranty as a part of the contract. The fact that both parties supposed and believed that the makers continued in business, is immaterial. In the sale of a horse, both parties may believe the animal is sound; probably, in most cases of the sale of notes, both parties believe and understand that the maker is solvent, but no warranty can be implied or inferred from that fact. So the facts that the plaintiffs would not have bought, and the defendants' brokers would not have sold without disclosing the facts to the purchaser, if they had known that the maker had failed, are immaterial.

It is recited in the facts agreed that the transactions of buying and selling commercial paper conducted through brokers "are confined to the paper of persons actually carrying on business." If the statement had stopped here, it might imply that there was a usage of brokers not to sell paper of makers who had failed, and that an intending purchaser had the right to rely upon the offer by the broker of a note for sale as an affirmation that the note offered was the note of a man or firm then in business. But the statement goes on in explanation of its meaning as follows: "In other words, it is the universal custom of such brokers not to offer for sale the paper of any person whom they have reason to believe to have failed or made an assignment." As thus explained, it goes little farther than to prove that it is the custom of brokers not to commit a fraud by concealing facts known to them. It does not go far enough to show any usage to warrant the note of any person, when the broker has no reason to believe that he has failed.

The plaintiffs rely upon the case of *Harris v. Hanover Bank*, 15 Rep. 390, in which the question here raised was decided in their favor. We think that case is in conflict with the weight of the authorities. In that case the court relies upon the au-

thority of *Roberts v. Fisher*, 43 N. Y. 159, but that is a case of the payment of a debt by a worthless note. There are cases like *Roberts v. Fisher*, where it has been held that, if one pays a debt by a worthless note, draft, or check, the debt is not extinguished. *Small v. Franklin Mining Co.* 99 Mass. 277. *Weddigen v. Boston Elastic Fabric Co.* 100 Mass. 422. The distinction between such a transaction and the sale of a note in the market, is obvious. Where a man offers a note, draft, or check in payment of a bill, unless something is said to the contrary, he offers it as an equivalent for money, and thus tacitly represents that it is as good as money. But the offer of a note for sale, without recourse to the seller, does not involve any representation as to the solvency of the parties to it, or as to its value.

We think the principles we have stated are decisive of the case before us. The defendants sold the note in good faith. So far as the evidence shows, neither party, at the time of the sale, spoke of, or inquired about, or knew anything about, the failure of the makers. They stood upon an equal footing, and they had equal means of knowing the standing of the makers. It was understood that the defendants were selling the note without recourse to them. They did not expressly warrant the value of the note, and we are of the opinion that from the circumstances no warranty could fairly be inferred of the solvency of the makers, or that they continued to do business.

We are therefore of opinion, that the first three instructions requested by the defendants should have been given, and that, upon the facts of the case, the court was not justified in finding for the plaintiffs.

Exceptions sustained.

FRANCIS DORAN vs. SAMUEL COHEN.

Suffolk. March 12, 1888. — June 27, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Declaration — Amendment — Bond to dissolve Attachment — Discharge of Surety.

A count in a declaration set out that the defendant so negligently managed his steamboat as to run down the plaintiff's sailboat, in which he was sailing using due care, whereby it was rendered useless, and the plaintiff was damaged to the extent of its value and otherwise. A second count was added by way of amendment, reciting that the plaintiff by the same tortious act was injured in his person. *Held*, that both counts were for the same cause of action, and that a surety on a bond given to dissolve an attachment in the action was not discharged by the amendment.

CONTRACT against a surety on a bond, given to dissolve an attachment in an action of tort brought by the plaintiff against William H. Swift. Answer, that after the execution of the bond, and before trial of the former action, the plaintiff changed his cause and form of action, by adding a count to his declaration without the consent of, and without notice to, the defendant.

The declaration in the original action contained two counts, the first of which was as follows: "And the plaintiff says that he was possessed of a certain sailboat; that the defendant was possessed of a certain steamboat, which was under the care, management, and control of the defendant; that, while the plaintiff was sailing in his said sailboat lawfully, and in the exercise of due care, the defendant so negligently, carelessly, and unskillfully managed, steered, and piloted his said steamboat, that said steamboat struck upon, in, and against the plaintiff's said sailboat, rendering it unfit for use, whereby the plaintiff has been put to great damage, and by way of special damage the plaintiff says his said sailboat was worth to him the sum of two hundred dollars; and the plaintiff has been damaged to that extent and otherwise." The second count was in the same words as the first count, including the words "managed, steered, and piloted his said steamboat," and thence concluded as follows: "That said steamboat struck against and upon the

plaintiff, and smashed the plaintiff's said sailboat, thereby causing the plaintiff to fall into the water of Boston Harbor, in which the plaintiff had to remain a long time, and where the plaintiff had to struggle hard to keep from drowning, and was put in great fear of the loss of his life; in consequence of all which the plaintiff was damaged in body and mind, was put in great suffering, rendered unable to work for a long time, and was put to great expense."

At the trial in the Superior Court, before *Hammond*, J., without a jury, it was admitted that the plaintiff recovered judgment in the original action for fifty dollars, damages, and seventy-two dollars and thirty-three cents, costs of suit; that such judgment remained unsatisfied; that the second count in the original declaration was allowed as an amendment, without notice to the sureties on the bond, and without their knowledge; that the verdict in the original action was a general one; and that counsel in the original action would testify that the second count referred to the same collision as the first count, and that the claim for personal injuries was omitted in the first count through inadvertence.

The plaintiff asked the judge to rule that the second count did not introduce a new cause of action which would discharge the defendant as surety.

The judge refused so to rule, but ruled that the second count did introduce a new cause of action, and that the liability of the surety was increased thereby, and found for the defendant; and the plaintiff alleged exceptions.

J. H. Ponce, for the plaintiff.

R. J. McKelleget, for the defendant.

MORTON, C. J. The sureties upon a bond to dissolve an attachment are not discharged by an amendment of the declaration, unless its effect is to let in a new cause of action, and thus to impose upon them a liability greater than that which they assume by signing the bond. The original declaration may be imperfect and insufficient, but any amendment to cure such defect will not discharge a surety or release bail, unless it introduces a new cause of action. The obligation of the surety is to pay the plaintiff in the action the amount he shall recover therein, and the surety cannot take advantage of formal defects

in the declaration. *Wood v. Denny*, 7 Gray, 540. *Cain v. Rockwell*, 132 Mass. 193. *Kellogg v. Kimball*, 142 Mass. 124.

In the case before us, the two counts of the declaration are for the same cause of action. The gist of each is, that the defendant negligently managed his steamboat so as to run down the sailboat of the plaintiff when he was sailing in it, using due care. Each count sets out the same tortious act of the defendant as the cause of action. They differ only in that the original count sets out that the plaintiff's sailboat was rendered unfit for use, that it was worth \$200, and that he was "damaged to that extent and otherwise"; while the amended count alleges that he was injured in his person. The plaintiff could not legally maintain more than one action for the same tortious act. He could not divide the tort, and have one action for the injury to his property and another for the injury to his person. *Bennett v. Hood*, 1 Allen, 47. *Trask v. Hartford & New Haven Railroad*, 2 Allen, 331. This is upon the ground that he could not maintain two suits for the same cause of action.

As the two counts are for the same cause of action, we are of opinion that the allowance of the second count as an amendment did not discharge the sureties on the bond to dissolve the attachment.

Exceptions sustained.

JOSEPH B. MOORS vs. C. EVERETT WASHBURN.

Suffolk. March 26, 1888. — June 28, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Collateral Security — Pledgee's Interest in Damages for Conversion.

An agreement by a pledgor recited that the pledgee might hold and apply collateral security held by him, not only for the specific debt secured, but also as "general collateral security for any and all indebtedness or liability existing or which might hereafter exist" between them, "whether previous to the giving of said security or subsequent thereto." *Held*, that the pledgee might apply the security when he received enough from it to pay the specific debt secured to the payment of such general indebtedness.

The collateral security consisted of wool deposited in a warehouse in the pledgee's name, and the warehouseman recovered judgment for its subsequent conversion. Meanwhile the pledgor replevied the wool from the person converting it, but for the benefit of the pledgee, who, together with the pledgor, became surety on the replevin bond, and who sold the wool and applied the proceeds to the pledgor's indebtedness to him. Judgment for the defendant was rendered in replevin and a return of the wool was ordered, whereupon a settlement was effected by deducting from the judgment for the conversion an amount agreed to represent the liability of the sureties on the replevin bond. *Held*, that the pledgee could apply the balance of such judgment in further reduction of the pledgor's indebtedness to him.

BILL IN EQUITY, changed in the Superior Court from an action of contract for money had and received, to establish a trust in the same fund for the benefit of the plaintiff, doing business under the name of J. B. Moors and Company. Hearing before *Dewey, J.*, who made certain findings of fact, and ordered the bill to be dismissed; and the plaintiff appealed to this court. The facts appear in the opinion.

H. L. Harding, for the plaintiff.

C. E. Washburn, *pro se*.

W. ALLEN, J. The defendant Washburn has in his hands money collected on a judgment in an action of trover brought by one Pratt against the Boston Heel and Leather Company, for the conversion of fifteen bags of wool, in which action Washburn was the attorney for the plaintiff, and is the assignee from him of the judgment. One Moore was the general owner of the wool, and had pledged it to the plaintiff as collateral security, and it was stored in the plaintiff's name with Pratt as a warehouseman, when it was converted by the Boston Heel and Leather Company. The judgment was for \$1,758, the value of the wool. The only interest Pratt had in the wool was his lien as warehouseman; but that has been satisfied, and the right to the fund is in the plaintiff or in Moore, subject to the claim of the defendant Washburn for his fees, which is not in dispute.

The defendant says, in the first place, that the debt which was secured by the wool has been paid. The agreement under which the wool was pledged recited that Moore transferred the wool to the plaintiff as collateral security for the payment of Moore's note, which was described, and contained these words: "It is understood and agreed by me that the conditions printed

or written on the other side, and assented to by my signature, shall form part of this contract." One of the conditions referred to was this: "Any and all collateral security held by J. B. Moors and Company for my account, whether under the within contract or otherwise, may be held and applied by said J. B. Moors and Company, not only as security for the specific indebtedness within mentioned, but also as general collateral security for any and all indebtedness or liability existing, or which may hereafter exist, from me to you, whether previous to the giving of said security or subsequent thereto." There is no ambiguity in this; the contract is explicit that the security held under it may be held as general collateral security for present and future indebtedness, and the claim of the defendant, that the right of the plaintiff to the security ceased when he received enough from it to pay the note specifically secured by it, cannot be sustained. The plaintiff had a right to treat it as security for the large general indebtedness of Moore to him.

The other objection is, in effect, that the plaintiff, having sold the wool and applied the proceeds upon the indebtedness it secured, cannot also hold the damages recovered for its conversion. The material facts upon which this objection is founded are, that, after the action of trover was commenced against the Boston Heel and Leather Company for the conversion of the wool, it was replevied from that company in an action in the name of Moore, but for the benefit of the plaintiff, and delivered to the plaintiff, who sold it for more than enough to pay the note specially secured by it, and applied the proceeds on Moore's general indebtedness. The plaintiff was one of the sureties on the replevin bond. Judgment was rendered for the defendant in replevin, and a return of the goods was ordered on the same day on which judgment was entered in the action of trover. The plaintiff advised with the defendant Washburn in regard to both suits. A settlement was made of both suits, and the judgment in the action of trover was satisfied on discharging the replevin bond, and on the payment of \$750 by the Boston Heel and Leather Company. Pratt, the plaintiff in trover, represented in that action the interests of the general owner and of the pledgee; the replevin was by the general owner, at the request and for the benefit of the pledgee. The general owner

and the pledgee were both upon the replevin bond, and the defendant in replevin was entitled to recover of them the value of the goods as found in that action, and was liable in the action of trover to pay for their benefit the value of the goods as found in that action.

Whatever may have been the effect of the order of return, the satisfaction of the judgment in the action of trover fixed the general property in the wool in the defendant in that action, and substituted the damages in that action for the property converted. Moore and the plaintiff, as the real party who replevied and party to the bond, were bound to return the wool to the Boston Heel and Leather Company, and, failing to do that, were liable for its value on the replevin bond for the benefit of that company. The parties discreetly settled the whole matter by deducting the agreed amount of the liability of Moore and the plaintiff on the replevin bond — which seems to have been the amount for which the plaintiff had sold the wool — from the amount of the judgment in the action of trover. We are at a loss to see how this could give to Moore any right, as against the plaintiff, to the damages in that action, or release them from the plaintiff's lien as pledgee of the wool. If the plaintiff should receive, in all, less than the amount of the judgment in trover, it would be in consequence of the replevin of the property by Moore, and of the sale of the property by the plaintiff under the possession obtained by the replevin, which was valid as to Moore; if he should receive more, it would be for the benefit of Moore, in the same manner as if the property had been sold for more than its value.

We do not regard the assignment of the judgment by Pratt to the defendant Washburn as material.

Decree for the plaintiff.

WILLIAM MINOT, JR. vs. SARAH B. BAKER & others.

Norfolk. March 26, 27, 1888. — July 10, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ

Will — Trust for Charitable Purposes — Cy Pres — Framing of Scheme by the Court — Presumption.

A testator, by his will, gave the residue of his estate to his executor, "to be disposed of by him for such charitable purposes as he shall think proper"; and the executor died having disposed of only a small portion thereof for such purposes. *Held*, that the will created a valid trust for charitable purposes, and that the court would frame a scheme to carry out the trust.

During his life the testator invested a fund in a trust company for the benefit of a woman, interest to be paid to her for life, with the privilege upon due notice of capitalizing it, and the principal to be repaid to his executor at her death. The will, after reciting that provision had been made for her, proceeded, "It is not my wish or purpose that any investment which I have made or hereafter may make for her should be disturbed or changed by this will, but I direct that the same shall remain and be disposed of according to the conditions thereof, in the same way as though this will had not been made"; and contained a recommendation that she allow the fund to accumulate to a certain sum before drawing interest. Interest was added to the principal for several years, and she received interest on the new capital for twenty years thereafter, until her death, without objection. *Held*, that the entire fund fell into the residue for charitable purposes, and that her executor was not entitled to the interest thus capitalized.

HOLMES, J. This is a bill for instructions, brought by the administrator *de bonis non*, with the will annexed, of Captain John Percival. The will appointed John P. Healy executor, and gave the residue to Healy, "to be disposed of by him for such charitable purposes as he shall think proper." Healy died, having disposed of only a small portion of the residuary estate in his hands for charitable purposes. The first question raised by the report is, "Whether the sum of \$14,503.75, received by the plaintiff from the suit upon the bond of Healy, as executor of Percival's estate, and from the suit against Healy's administrator, should be paid to the next of kin of John Percival, by reason of the failure of said Healy to dispose of the fund in his lifetime for the purposes specified in the residuary clause of the will of said Percival, or should be applied to charitable purposes, according to a scheme under the direction of the court."

It is settled that the gift to Healy was a good charitable trust. *White v. Ditson*, 140 Mass. 351, 353. *Schouler, petitioner*, 134 Mass. 426. *Saltonstall v. Sanders*, 11 Allen, 446, 453. *Wells v. Doane*, 3 Gray, 201. *Everett v. Carr*, 59 Maine, 325. *Pocock v. Attorney General*, 3 Ch. D. 342. *Chapman v. Brown*, 6 Ves. 404, 410. *Dundee v. Morris*, 3 Macq. 134, 158. There was no resulting trust on account of the vagueness of the objects, as there is in cases where the objects are not confined to charities. *Nichols v. Allen*, 130 Mass. 211. The first point to be determined, therefore, is a matter of construction, whether the limitation to charities was conditional upon Healy's making an appointment, or whether it should be construed as a gift to charitable uses out and out, with a superadded power to Healy to specify them if he saw fit. And on this part of the question we are of opinion that the gift is an unconditional gift to charitable purposes.

There can be little doubt that such would be the construction adopted by the English courts. *Attorney General v. Fletcher*, 5 L. J. Ch. 75, 78. *Pocock v. Attorney General*, *ubi supra*. *Moggridge v. Thackwell*, 7 Ves. 36; *S. C.* 13 Ves. 416. *Mills v. Farmer*, 1 Meriv. 55, 100. *White v. White*, 1 Bro. C. C. 12. *Baylis v. Attorney General*, 2 Atk. 239. *Attorney General v. Hickman*, 2 Eq. Cas. Abr. 193. *Doyley v. Attorney General*, 2 Eq. Cas. Abr. 194. *Anon.* Freem. 262 b. *Copinger v. Crehane*, Ir. Rep. 11 Eq. 429. Although a different opinion has been intimated in some American cases, at least, where there is a naked power not coupled with a trust. *Fontain v. Ravenel*, 17 How. 369, 388, 399 (explained and limited by *Russell v. Allen*, 107 U. S. 163, 169). The question must be kept distinct from other questions which do not bear upon the meaning of the words, such as whether a trust for charity generally is valid, or whether a court of equity can and will exercise so general a discretion as is necessary to carry out the trust, etc. If the meaning of the words alone is considered, it appears to be tolerably plain that the English construction is right. The nature of the gift shows that an application of the funds to charity is the dominant object, and that the selection by the trustee is subordinate, or means to an end. It is not like a gift to a particular charity which fails; there the specific object of bounty

or end of the trust may well have furnished the main motive of the testator for giving to charity at all. But to give a power of selection to a party who takes no interest in the fund cannot be supposed to be the main motive of such a trust as we are considering, and the motive of charity goes no further than charity generally, because the testator leaves the rest to his trustee. The testator in such a case says, in effect, I give the fund in trust for charitable purposes, and, to save application to the court, I authorize the trustee to determine the scheme.

In the ordinary case of trusts for such persons of a class as the trustee shall select, when a duty to select is imposed upon the trustee by implication, a general intention to benefit the class is recognized, and the trust will not fail if the trustee accepts it and then fails to make a selection. *Brown v. Higgs*, 4 Ves. 708; *S. C.* 5 Ves. 495, and 8 Ves. 561. *Burrough v. Philcox*, 5 Myl. & Cr. 72. *Penny v. Turner*, 2 Phillips, 493. *Harding v. Glyn*, 1 Atk. 469. *Mahon v. Savage*, 1 Sch. & Lef. 111. *Spring v. Biles*, 1 Sch. & Lef. 113, note; *S. C.* 1 T. R. 435, note. *Salisbury v. Denton*, 3 Kay & Johns. 529. *Nichols v. Allen*, 130 Mass. 211, 219. *Drew v. Wakefield*, 54 Maine, 291.

Here there is a trust, not a mere power, and it was recognized in *White v. Ditson*, *ubi supra*, that a duty was imposed upon Healy to act, which is a strong circumstance in favor of the construction that the benefit is not intended to be made dependent upon his acting. *Brown v. Higgs*, 8 Ves. 561, 571, 574. *Cole v. Wade*, 16 Ves. 27. *Moggridge v. Thackwell*, 7 Ves. 36, 82. And it being settled that in some cases you can separate the general intent from the mode of execution, the nature of the gift in the particulars to which we have adverted already seems to us to make the case a stronger one for doing so than where the selection is to be made from relations or the like, as in the decisions cited. At all events, this case is nearer to those than to a gift to such persons as A. may appoint. *Mills v. Farmer*, *ubi supra*. For there the limitation is as wide as the world, and if A. does not take the beneficial interest it is impossible to suppose that a gift is intended unless he exercises the power confided to him. But charitable purposes constitute a well-defined class, to which it is entirely conceivable that a testator should make a gift. We shall consider the validity of such a gift in a moment.

The construction of the will being what we have declared, the question arises whether a trust originally valid is to fail for want of a trustee, contrary to the general doctrine of equity. There is no doubt that, if there were a very slight indication of the direction which the testator meant his bounty to take, a court of equity would find itself able to carry out the will. In *Schouler, petitioner, ubi supra*, the gift was for "charitable purposes, masses, etc.," and the court appointed a new trustee. See also *Copinger v. Crehane*, Ir. Rep. 11 Eq. 429. But it is argued that when the gift originally is, or through the failure of the first trustee to exercise his discretion afterwards becomes, a gift to charitable uses *simpliciter*, then the disposition of the fund in England was in the king as *parens patriæ*, by the sign manual, and that a court of equity as such has no jurisdiction.

It is to be observed, that the objections to the exercise of the power to frame a scheme in the case supposed are not at all similar to those which apply to a diversion by the sign manual to wholly different uses of property devoted to a specific purpose which fails, because contrary to the policy of the law for instance, as in the well-known case of *Da Costa v. De Pas*, 1 Ambler, 228, *S. C.* 2 Swanst. 487, note, where a legacy to establish a Jesuba, or assembly for reading the law and instructing people in the Jewish religion, was devoted to the Foundling Hospital for the instruction of the children in the Christian religion. In such a case there is no pretence, or only a pretence, of carrying out the directions of the testator. His will is arbitrarily overridden. *Moggridge v. Thackwell*, 7 Ves. 36, 81. But in a case like the present, whether the machinery used is the sign manual or a scheme prepared under the direction of the court, the testator's wishes are carried out as he has expressed them, just as they might be by the appointment of a trustee, or by the framing of a scheme in those cases where the jurisdiction of the court is admitted.

The only objection on the ground of policy to the court's entertaining jurisdiction which has occurred to us is, that it must choose from too wide a field when there is nothing more specific to guide it than a general direction to apply the fund to charitable purposes. If the objection in this general form were sound, a trust for charitable purposes generally ought to have been held void, whereas all the English cases imply, and express

decisions establish, that it is valid. *Nichols v. Allen*, 130 Mass. 211, 221. *Moggridge v. Thackwell*, 7 Ves. 36, 80. *Paice v. Archbishop of Canterbury*, 14 Ves. 364. *Legge v. Asgill*, Turn. & Russ. 265, note. *Dolan v. Macdermot*, L. R. 3 Ch. 676. *Pocock v. Attorney General*, 3 Ch. D. 342. *Anon. Freem. Ch.* 261, case 330 b. It has been said that "the court never, in trusts or powers, exercises a discretion." *Felan v. Russell*, 4 Ir. Eq. 701, 704. But the court has never hesitated to frame a scheme, or to make a choice of the individual beneficiary, when the species of charity was indicated. *Baylis v. Attorney General*, 2 Atk. 239. *White v. White*, 1 Bro. C. C. 12. *Mills v. Farmer*, 1 Meriv. 55; *S. C.* 19 Ves. 483. *Attorney General v. Gladstone*, 13 Sim. 7. *Gillan v. Gillan*, 1 L. R. Ir. 114. And, as is pointed out by Mr. Justice Gray, in *Jackson v. Phillips*, 14 Allen, 539, 580, a charity being a trust in which the public is interested, and which is allowed by the law to be perpetual, "deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust; for without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail by change of circumstances," etc. Bearing these considerations in mind, and also that under the English practice there would have been no difference in the execution of the trust, whether by the court or by the sign manual, (*Moggridge v. Thackwell*, 7 Ves. 36, 87,) we think that the court would find no insuperable difficulty in selecting the species, as well as the particular object, of the charity.

If this be so, the objections remaining to the jurisdiction are purely historical; that it was not exercised in England, and therefore cannot be exercised here; that although in England there was a remedy existing alongside of the ordinary jurisdiction of the chancellor, and practically reaching similar results, yet, since this court has not the powers exercised by the sign manual, a will must be defeated, and a trust must fail which this court but for tradition is perfectly competent to carry into effect by machinery which it would have no hesitation in using were the case a hair's breadth different.

If it is possible to avoid such a result, it is desirable to do so, and the historical tradition must be very clear, and the limit

of jurisdiction very well defined, to make it necessary that this court should decline for such arbitrary reasons to enforce a trust which it recognizes as valid. It might be hard to escape from the authorities, if no trust were interposed. *Jackson v. Phillips*, 14 Allen, 539, 576. And it is not to be denied that some courts of authority would probably require a specification of the charity, whether there was a trust or not. *Bristol v. Bristol*, 53 Conn. 242, 256. *Felan v. Russell*, 4 Ir. Eq. 701; *S. C. Longf. & Towns*, 674. *Clifford v. Francis*, Freeman, 330. O'Leary, Religious and Charitable Uses, 183. On the other hand, in *Moggridge v. Thackwell*, 7 Ves. 36, although there were some words of recommendation in the will, not amounting, however, to a limitation of the generality of the trust (7 Ves. 85, 86), and although the circumstance that some objects were pointed out was adverted to in the discussion, Lord Eldon did sanction the opinion, that, if there is or ever has been a trustee, that is enough to warrant the court in framing a scheme, irrespective of the question whether the testator has pointed out any species of charity or not.

In that case, Lord Eldon said that he doubted whether, if the decree upon the principles attaching to charitable uses must have called upon the trustees, it could be said that, because the trustee is dead, the court is not to make a decree ordering such direction, for no such order could be given to the king executing by sign manual. And again in *Paice v. Archbishop of Canterbury*, 14 Ves. 364, 372, he laid it down generally, that, when the bequest is to trustees for charitable purposes, the disposition must be the subject of a scheme before the master; but that, when the object is charity without a trust interposed, it must be by sign manual. See *Down v. Worrall*, 1 Myl. & K. 561, 563; *Reeve v. Attorney General*, 3 Hare, 191, 197; *Cook v. Duckenfield*, 2 Atk. 562, 567, decree stated; *Moggridge v. Thackwell*, 7 Ves. 36, 83, 84; Boyle, Charities, 239. In the Anonymous case, Freem. Ch. 261, "it was said, and not denied, that if a man deviseth a sum of money to such charitable uses, as he shall direct by a codicil to be annexed to his will, or by a note in writing; and afterwards leaves no direction, neither by note nor codicil, the Court of Chancery hath power to dispose of it to such charitable uses as the Court shall think fit." *Mills v. Farmer*, 1 Meriv. 55, 59, 95.

We do not propose to inquire very curiously whether Lord Eldon's view in the latter case before him is historically accurate or not. It is a view which certainly goes no further than some of the earliest cases, and which it is necessary to adopt in this country to prevent a failure of justice. If we acted with less sanction, we should be conforming to the substantive principles of equity by framing an equitable remedy where we recognized an equitable right. We are of opinion that the above mentioned sum of \$14,503.75 should be applied to charitable purposes according to a scheme under the direction of the court.

Two other questions are raised by the report, and remain to be considered.

During his life the testator made certain deposits in the Massachusetts Hospital Life Insurance Company through William Sturgis. The Life Company issued policies promising to pay Maria Gassett interest "unless added to the principal sum as provided below," and after her death to pay the amount of the principal sum to Captain Percival, his executors or administrators. The provision in the policy referred to allowed Mrs. Gassett to have the annual "payments added to the principal sum (in order to increase said principal sum)," giving the company sixty days' notice. Interest was capitalized annually by the company on these policies, from their dates in 1851 and 1852 through January 1, 1863, and the amount of the interest and the former capital added was indorsed on the policy, under the head, "New Capital, being the principal sum with the successive accumulations of interest." It is alleged, and admitted in the pleadings, that this was done at Mrs. Gassett's election, and in pursuance of the agreement in the policies. An express direction on her part was not proved, but it appears that Mrs. Gassett received interest on the new capital for over twenty years, until her death, and never objected to the additions or demanded the interest which had been capitalized.

Captain Percival by his will stated that he had made provision for Mrs. Gassett, and proceeded, "It is not my wish that any investment which I have made, or hereafter may make for her, should be disturbed or changed by this will, but I direct that the sum shall remain and be disposed of according to the conditions thereof, in the same way as though this will had not been made.

I advise," etc. Mrs. Gassett died in 1887. The plaintiff has collected the amount due on the policies, and the further questions raised are whether these amounts are to go to the next of kin, as if the will had not been made, or go to charity, as part of the residue; and also whether Mrs. Gassett's executor is entitled to a portion of the sums collected equal to the amount of interest added to the original capital, as we have described.

On the former question it is argued that the testator meant, by the language which we have quoted, to withdraw the whole investment in the Hospital Life Company from the operation of his will. If that was not his intention, the clause has no effect, since, of course, Captain Percival could not disturb by his will Mrs. Gassett's vested life interest under the policies. But the words used apply to "any investment" which the testator may make in the future, as well as to those which he has made in the past, and they apply only to investments "for her," and to nothing else. We cannot limit their meaning to a specific reference to the investments in the Hospital Life Company as a whole, nor extend it beyond Mrs. Gassett's interest, whatever it may turn out to be in this or that particular fund. We are constrained to hold that Captain Percival's interest in the policies is not excepted from the operation of his will, but is a part of the estate disposed of by it, and must be applied to charitable purposes.

On the last question, as the pleadings stand, and apart from the pleadings in view of Mrs. Gassett's course of conduct while alive, we must assume that the additions of interest to capital were made with her consent, as recommended by Captain Percival in his will, and we must take the additions to have been made absolutely and for all purposes, so that her executor has no claim, but the principal fund as increased goes under the policies to the administrator of Captain Percival, to whom the company paid it. See *In re Curteis' trusts*, L. R. 14 Eq. 217.

Decree accordingly.

E. M. Johnson, for the plaintiff, read the papers in the case.

E. H. Bennett, for nieces of the testator.

S. H. Phillips, for the Attorney General.

C. M. Reed, for certain next of kin.

G. F. Tucker, for the executor of Maria Gassett.

JOSEPH BERNARD & another vs. BARNEY MYROLEUM
COMPANY & another.

Suffolk. March 27, 28, 1888. — September 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Assignment in Fraud of Creditors — Equity Jurisdiction — Bill by single
Creditor.*

- A corporation executed to a creditor, who held its notes as security for advances, an assignment of its property, the object of which was, not to secure that debt or to raise money for the payment of its other debts, but to prevent the attachment of the property by other creditors and to secure its continued use in the business. *Held*, that a finding was authorized, if not required as matter of law, that the intent of the parties to the assignment was to hinder, delay, and defraud the corporation creditors.
- A single creditor may, under the Pub. Sts. c. 151, § 3, maintain a bill in equity to reach and apply in payment of his debt the property of a debtor fraudulently conveyed by him with intent to defeat, delay, or defraud his creditors, in lieu of an attachment and execution in an action at law.

BILL IN EQUITY, under the Pub. Sts. c. 151, § 3, filed October 8, 1887, to set aside an assignment executed by the first-named defendant to the other defendant, Gilbert N. Hall, as in fraud of creditors. Hearing before *C. Allen, J.*, who found, if competent to do so upon the facts in evidence, that the assignment was made with the intent to hinder, delay, and defraud the creditors of the company, and especially the plaintiffs, and that the other defendant was chargeable with knowledge of such fraudulent intention, and reported the case for the consideration of the full court. The facts appear in the opinion.

H. G. Nichols & C. K. Cobb, for the plaintiffs.

E. R. Champlin, (*J. H. Wigmore* with him,) for the defendants.

W. ALLEN, J. The first question presented is, whether it was competent for the justice who heard the case to find, upon the facts reported, that the assignment was made with the intent to hinder, delay, and defraud creditors of the company. It may be assumed that Gilbert N. Hall, the assignee, was a creditor of the company, and that the ostensible purpose of the assignment was to secure payment to him, and that the company had a right to give a preference to him over other creditors, and

that the detriment to other creditors resulting from the preference was not fraudulent, nor evidence of fraud, as to them. A creditor receiving a conveyance in preference to other creditors stands in no better position than a purchaser for value; and in either case the question is whether one purpose of the conveyance is to hinder, delay, and defraud creditors. The distinction made by Chief Justice Bigelow in *Banfield v. Whipple*, 14 Allen, 13, is enough for the present case; he says: "The distinction is between a transfer of property made solely by way of preference of one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, which is fraudulent and illegal." See also *Giddings v. Sears*, 115 Mass. 505.

The material facts bearing on the intent and purpose of the assignment can be briefly stated. Charles H. Hall owned one half of the stock of the company, and was its president, treasurer, and manager; he lent money to the company, which he borrowed for the purpose from his brother, Gilbert N. Hall, and for which he gave partial security upon his own property. The company subsequently voted to give its notes to Charles H. Hall, "or to whom he may desire," to cover said money lent by him to the company, and Charles H. executed notes of the company payable to the order of Gilbert N. for the amount, which notes constitute the debt due to Gilbert N., to secure which the assignment in question was made. Charles H. acted for Gilbert N. in the matter, under full authority, and having the entire management of the matter. Charles H. retained the notes in his possession until the assignment, and no entry of them was made in the books of the company. The assignment was made on September 21, 1887. The plaintiffs had been selling goods to the company for more than two years prior to August, 1887, and for a year before that time the company had been unable to meet its notes at maturity, and had been assisted by the plaintiffs by advances in cash to pay its notes. On the 23d of August, 1887, the company showed a statement of its condition to the plaintiffs, and negotiations continued between the parties until the assignment, in regard to the terms upon which the plaintiffs would grant an extension of the time of payment of their debt and give further credit to the company. At least as

early as the 17th of September, four days before the assignment, the company had given up any intention to make an arrangement with the plaintiffs, and the assignment to Gilbert N. Hall had been determined on; but the pretence of negotiations with the plaintiffs was kept up, and letters and telegrams were sent to them for the purpose of deceiving them and preventing them from taking legal measures to collect their debt. On the 19th of September, a suit was commenced by direction of Charles H. Hall on the notes to Gilbert N., on which all the property of the company was attached, and on the 21st of September, at a meeting of the directors at which Charles H. Hall and one other director, Gilbert N. Hall, and one other person, who was counsel for the company as well as the counsel of Charles H., were present, the assignment which had been prepared under the direction of Charles H. was adopted, and together with the notes was delivered to Gilbert N.

In the assignment, there are provisions for carrying on the business, extracts from which are as follows: "The party of the second part may in his discretion carry on in the name of the party of the first part, or otherwise, the business as carried on by the party of the first part, with a view to the gradual winding up of the same instead of immediately selling the same, and for the purpose of such carrying on and winding up he may employ or authorize the employment of any of the agents of the party of the first part as manager or managers of said business. . . . And it is agreed and declared that, for the purpose of carrying on as aforesaid the said business, it shall be lawful for the party of the second part from time to time, at the expense of the estate hereby transferred, to procure, by purchase, lien, or otherwise, such stock in trade, fixtures, materials, chattels, and articles as he shall think fit." Gilbert N. Hall took formal possession of the property, but left it in charge of Charles H. Hall as his agent, who continued to carry on the business until the filing of the bill in this case.

Not taking into account facts stated in the report, and perhaps some before adverted to, which are equally consistent with an intent to prefer Gilbert N. Hall and an intent to secure the continuance of the business, it appears that Charles H. was a creditor of the company for the amount which was secured by

the notes to Gilbert N. ; that Charles H. acted for the company, and also acted for Gilbert N. ; that his interest personally, and as the representative of the company and of Gilbert N., was that the property of the company should not be sold to pay its creditors, whether himself, Gilbert N., or the plaintiffs, but should be continued in the business ; that his object, and the object of the company in the negotiations with the plaintiffs, was to prevent the property of the company from being taken to pay its debts, and to secure its continued use in the business ; that the attachment was made by Charles H., not to secure the debt to Gilbert N., but to prevent the attachment of the property by the plaintiffs before the intended assignment could be perfected ; and that the purpose of the assignment was to prevent the property from being attached by the plaintiffs, and to continue its use in the business. The evidence was clearly competent to prove these facts, and to authorize, if it did not in law require, the finding, that the intent of both parties to the assignment was to hinder, delay, and defraud creditors of the company. See *Dunham v. Waterman*, 17 N. Y. 1 ; *Jones v. Syer*, 52 Md. 211 ; *Gardner v. Commercial Bank*, 95 Ill. 298 ; *Spencer v. Slater*, 4 Q. B. D. 13.

The Pub. Sts. c. 151, § 3, give jurisdiction in equity to reach, and apply in payment of a debt, any property of a debtor liable to be attached or taken on execution in a suit at law against him, and fraudulently conveyed by him with intent to defeat, delay, or defraud his creditors. This provision was first enacted in the St. of 1875, c. 235. Before that statute, a creditor could reach property of his debtor, fraudulently conveyed, by attachment and execution in an action at law. The statute gave him a concurrent remedy in equity to enforce the same right. A bill under the statute is not a creditor's bill, or primarily a bill to reach property which cannot be come at to be attached or taken on execution, but a bill to enforce the right of a creditor to take property of his debtor on execution. The bill is brought by a single creditor in his own behalf, and under the decree the property will be applied to his debt. *Powers v. Raymond*, 137 Mass. 483. *Squire v. Lincoln*, 137 Mass. 399. *Trow v. Lovett*, 122 Mass. 571. *Giddings v. Sears*, 115 Mass. 505, 508.

Decree for the plaintiffs.

E. EVERETT BURDON & others vs. MASSACHUSETTS SAFETY
FUND ASSOCIATION & another.

Suffolk. April 4, 1888. — September 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Contract of Beneficiary Association — Attachment and Distribution
of Safety Fund.*

A beneficiary association agreed to make assessments at the death of members upon the holders of certificates of membership then in force, and to pay the sums collected not exceeding a limited sum as an indemnity. It collected from members under its by-laws, and deposited with a trust company, a safety fund, so called, which was expressly limited to enure in a certain event to the benefit of certain members only, for the payment of future dues and assessments. This fund was not to be used to make good such indemnity, but, if the association should fail to pay the indemnity, was to be divided among the holders of certificates then in force, deducting the expenses of its management. On the back of each certificate was a statement that the safety fund would afford substantial protection to members, and also a caution to the holder thereof to "read carefully all the conditions of this certificate," to which was added, "No person should be a party to a contract without knowing all its conditions." *Held*, on a bill in equity to dissolve the association upon its failure before the event, that the safety fund was to be divided among certificate holders not in default, including the representatives of such deceased holders, a reasonable sum for its management being first deducted, and that claimants for death losses as such merely were not entitled to share in the fund, and could not attach it by the trustee process.

A certificate was to be null and void upon a member's failure to pay, 1st, dues for expenses payable monthly while it remained in force; 2d, the sum due thereon towards the safety fund within a year from its date; and 3d, duly notified assessments within a time limited. *Held*, that a failure to pay monthly dues after the association ceased to do business would not forfeit a certificate; that a payment towards the safety fund to entitle a holder to share therein might be made at any time within the year, though after the date of filing the bill; but that non-payment of any assessment, duly made before the latter date, within the limit, would avoid a certificate.

BILL IN EQUITY, filed November 3, 1885, for the dissolution of the first-named defendant, a beneficiary association, and for the appointment of a receiver. The first six plaintiffs were a majority in number and interest of the stockholders in the association, and the remaining plaintiff was a certificate holder, who purported to act for himself and all other holders of certificates of membership in the association, which certificates were alleged to have been issued by it up to May 20, 1885. The other defendant was the Boston Safe Deposit and Trust

Company, with which the association had deposited in trust certain funds.

On February 8, 1886, a decree was made dissolving the association and appointing a receiver, who was directed, among other things, to "get in all the trust funds and income in the possession of the Boston Safe Deposit and Trust Company." On April 20, 1886, the receiver filed a petition, which he was permitted to prosecute, for the dissolution of certain attachments by the trustee process upon the funds in the possession of the trust company, and for an account of such funds and their payment over to the receiver. Hearing before *W. Allen, J.*, who reserved the case for the consideration of the full court, in substance as follows.

The association was duly organized on July 20, 1880, and in December, 1881, adopted by-laws, which provided that each member was to pay to the secretary within one year from the date of his certificate ten dollars towards a safety fund, so called, failure to pay within that time involving a lapse of the certificate; that the treasurer should deposit all moneys received by him for such safety fund with the Boston Safe Deposit and Trust Company; and that five certificates only, of one thousand dollars each, should be issued upon a single life. The association began to do business in December, 1881, and during its existence issued two forms of certificates of membership. Certificates of the first form were issued by it to a large extent up to July 24, 1884, and certificates of the second form were issued from that date to May 20, 1885, but to a much less extent, about seventy-five dollars only being paid into the safety fund under this form of certificate. The first form of certificate contained the following provisions, which alone are material:

"The Massachusetts Safety Fund Association, of Boston, Massachusetts, in consideration of the representations, agreements, and warranties made in the application herefor, and of the admission fee paid, and of the sum of ten dollars to be paid to said association to create a safety fund, as hereinafter described, and of twenty-five cents to be paid monthly for expenses, and of the further payment, in accordance with the conditions hereof, of all mortuary assessments, does hereby issue this certificate of membership in said association, under the safety

fund and endowment system, to —, of —, county of —, State of —, with the following agreements:

“ That said association will cause to be deposited said sum of ten dollars, when received, with the Boston Safe Deposit and Trust Company, for the uses and purposes of the association as hereinafter expressed ; and shall, at the expiration of five years from January 1, 1882, if said safety fund shall then amount to one hundred thousand dollars, or whenever thereafter said sum shall be attained, make a semiannual division of the net interest received therefrom, *pro rata*, among all the holders of its certificates in force under said system at such times, who shall have contributed, five years prior to the date of any such division, their stipulated proportion of said fund, by applying the same to the payment of their future dues and assessments ; and that whenever said fund shall amount to one hundred thousand dollars, all subsequent receipts therefor shall be divided by the said association in like manner as the interest.

“ Said association further agrees, that if, at any time after said fund shall have amounted to one hundred thousand dollars, or after five years from January 1, 1882, if that amount shall not have been attained before that date, it shall fail by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate issued by it under said system, and such certificate shall be presented for payment to said association by the legal holder thereof, accompanied by satisfactory evidence of its failure to pay, after demand upon it, within the time herein stipulated for limitation of action : then it shall be the duty of said association to at once convert said safety fund into money, and divide the same (less the reasonable charges and expenses for the management and control of said fund) among all the holders of certificates then in force under said system, or their legal representatives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of said certificates in force. And said association further agrees, that, so long as any certificate of membership under said safety fund and endowment system shall remain in force, said fund shall be in no wise chargeable or liable for any use or purpose except as above mentioned.

"Upon the death of the member aforesaid while this certificate is in force, all the conditions hereof having been conformed to by said member, and on the receipt by the president or secretary of said association of satisfactory proofs of such death, an assessment shall be made upon the holders of all certificates in force under said system at the date of such death, according to the table of graduated assessment rates given hereon, as determined by the respective ages and the number of such certificates in force at the date of such death, and the sum collected thereon shall be paid: provided, however, that in no case shall the payment upon this certificate in the event of such death exceed one thousand dollars, less any balance due said association for dues, assessment, or safety fund, to"

This certificate is issued by the company, and accepted by the member, upon the following express conditions and agreements:

"2. Of Payments. — The person to whom this certificate is issued agrees to pay to said association twenty-five cents for expenses, on the first day of each and every month, after date of issue, and so long as this certificate shall remain in force. And also agrees to pay said association, upon each certificate that shall become a claim, an assessment in accordance with the table of graduated assessment rates, as printed hereon, within thirty days from day on which notice bears date. And further agrees to pay said association the sum of ten dollars towards said safety fund, within one year from the date of this certificate, which will entitle the holder hereof to all the advantages under said fund as above set forth.

"3. Conditions of Acceptance. — The holder of this certificate further agrees and accepts the same upon the express condition that, if either the monthly dues, assessments, or the payment of the ten dollars towards the safety fund, as hereinbefore required, are not paid to said association on the day due, then this certificate shall be null and void, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force, from said association; and that, if a legal and just claim to benefit, under the terms of this certificate, shall arise before said safety fund shall have accumulated to one hundred thousand dollars, or before January 1, 1887, and the sum collected on the assess-

ments to be made in such event shall be paid over, as hereinbefore stipulated; or such claim shall arise after said fund shall have accumulated to said amount, or after January 1, 1887, and this certificate shall be fully settled and surrendered; or if any final division from said safety fund, as hereinbefore provided, shall be made by the association thereof on account of this certificate; then, in such cases, all liability of said association, on account of this certificate, shall cease.

"4. Mode of giving Notice. — A printed or written notice, directed to the address of the member, as it appears at the time on the books of the association, and deposited in the post-office at Boston, or delivered by an agent of the association, shall be deemed a legal and sufficient notice for all purposes hereof. A transcript of the books of said association, certified by the secretary, showing such facts, shall be taken and accepted as conclusive evidence of the mailing of such notice, and of the facts aforesaid, as set forth in such transcript."

On one portion of the back of the certificate appeared the following statement: "This association, organized and chartered under the laws of the Commonwealth of Massachusetts, and having its principal office in the city of Boston, will provide material and substantial protection for the families or other dependants of deceased members, to the extent of five thousand dollars, by means of the safety fund and endowment system, which combines an improved plan of co-operative protection with a safety fund deposit, thereby rendering all the members and their dependants perfectly secure, at the lowest possible rates. . . . A special deposit of all moneys for the safety fund is made with the Boston Safe Deposit and Trust Company, for the additional security of certificate holders." On another portion of the back of the certificate appeared the following: "Read carefully all the conditions of this certificate. No person should be a party to a contract without knowing all its conditions."

At the dissolution of the association, no certificate had been in force over five years, and while there were many claimants for death losses under certificates of membership, no unsatisfied judgment then existed against the association. Prior to November 3, 1883, certain claimants of death losses, including the administrator of one Leonard, had brought actions under

certificates of the first form against the association, and had attached by the trustee process the funds in possession of the trust company. The trustee under a will of a deceased claimant under a like certificate had also filed a bill in equity in this court against the association and the trust company to reach the same funds to satisfy his claim. The receiver had requested the trust company to pay over to him the funds in its possession, and had requested such claimants and trustee to discharge the trust company as such trustee and defendant, but all had refused to do so. The amount of the safety fund, with the accrued income thereof deposited by the treasurer of the association with the trust company, amounted, on January 1, 1888, to \$19,180.56, which was undoubtedly exceeded in amount by undisputed claims for death losses. The great majority of all the persons who had ever been holders of certificates in the association were persons of limited means, and not possessed of property which could be taken in satisfaction of any assessments if made, and it would be futile to attempt to obtain moneys with which to pay death claimants by means of general assessments.

The judge found that the association rightfully might deduct from the safety fund a reasonable sum for its management, and that this matter should be referred to a master, to ascertain and report what would be such a reasonable sum, and what was due from the association for salaries and expenses. The holders of certificates and the representatives of deceased holders contended that they were entitled to have the safety fund and accrued income distributed among them, while the claimants of death losses contended that the fund should be applied towards the payment of their claims.

C. Robinson, for the receiver.

W. C. Wait, for the certificate holders.

S. B. Allen & A. Wellington, for attaching creditors.

H. H. Buck, for the administrator of Leonard.

C. ALLEN, J. The principal questions arising in the present case relate to the disposition which shall be made of the safety fund, so called, which has been accumulated, and which now amounts to about \$19,000. There is nothing in the statutes of the Commonwealth which aids in determining these questions, and the determination of them must depend wholly upon the

terms of the contracts which the association made with those who took its certificates. These certificates were in two forms ; but no distinct question has been presented, or arises, under the second form of certificate. It does not appear that there were any claims for losses by death under the second form, and only seventy-five dollars went into the safety fund from holders under it. The counsel for the certificate holders makes no special contention in regard to this amount, and the questions may be dealt with as if the whole of the safety fund came from holders of certificates under the first form.

By the terms of the contract, the safety fund is not in any event directly liable for losses by death. It is rather a fund for the benefit of living certificate holders, than security for the payment of money to the representatives of deceased holders. The certificate is explicit upon this point. Upon the death of a member, all that the association undertakes to do is to make an assessment upon the holders of all the certificates in force at the date of the death, and to pay the sum collected thereon, not however in any case exceeding \$1,000. The safety fund was to enure to the benefit of members of five years' standing, by having the income from it, after five years, or after the accumulation should have amounted to \$100,000, applied to the payment of their future dues and assessments. If the association should fail to pay the indemnity provided for in the certificate, then the safety fund was to be converted into money, and divided among all the holders of certificates then in force ; it was not to be drawn upon to make good the indemnity for a loss by death. And there was a further express stipulation, that "said fund shall be in no wise chargeable or liable for any use or purpose except as above mentioned."

Now it is true that the association failed at an earlier period than was expressly provided for ; that is to say, it failed before the safety fund amounted to \$100,000, and before five years had elapsed. But, under the clause last copied above, no other use is to be made of the safety fund than to apply it as above mentioned.

The persons who make claim for losses by death contend that this result will work an injustice, and that holders of certificates understood, and had reason to understand, that the safety fund

was to provide a security for the losses by death. This argument is founded on a statement on the back of the certificates, that this association will provide material and substantial protection for the families or other dependants of deceased members, by means of the safety fund, which combines an improved plan of co-operative protection with a safety fund deposit, thereby rendering all the members and their dependants perfectly secure, at the lowest possible rates. But this statement is no part of the contract; it is only general language, not designed to supersede the necessity of reading the contract itself. There was another notice on the back of the certificate, directly calling upon the holder to "read carefully all the conditions of this certificate"; and adding, "No person should be a party to a contract without knowing all its conditions." However fallacious and visionary the hopes inspired by this form of life insurance might be, and however ill advised its provisions, we find nothing to vary the rights of the parties, ascertained from the terms of the contract into which they have allowed themselves to enter. The court cannot act as a special providence to protect one class in particular, where all are or may be losers. All we can do is to take the contract as we find it.

It follows, that upon the death of a member no attachment could be made of the safety fund, nor any action at law be maintained against the association, unless upon a refusal to lay an assessment upon the holders of certificates in force. The actions which were brought appear to have been brought under the misconception that the association had bound itself to pay \$1,000. It had only bound itself to lay an assessment, and to pay over the amount collected thereon. For a refusal to lay such an assessment, it may be that an action at law would lie; but the more appropriate remedy would be by a proceeding in equity to compel the association to lay the assessment. One of the conditions and agreements expressed upon the face of the certificate is, that "the person to whom the certificate is issued agrees to pay to said association, upon each certificate that shall become a claim, an assessment in accordance with the table of graduated assessment rates, as printed hereon, within thirty days from day on which notice bears date." For a failure to make such payment, the certificate would become null and void.

This was the security furnished for payment of losses by death, and the way in which the safety fund was expected indirectly to improve this security was by ultimately furnishing a fund to enable certificate holders to pay their assessments. Such is the plain language of the contract, and such is the construction which has been given to similar contracts in all the cases but one that have been brought to our attention. The single exception is in *Lueders v. Hartford Ins. Co.* 4 McCrary, 149; but the decision of the district judge in that case is overruled or overborne by other decisions. *Smith v. Covenant Mutual Benefit Association*, 24 Fed. Rep. 685, 688. *Eggleston v. Centennial Mutual Life Association*, 5 McCrary, 484. *Bailey v. Mutual Benefit Association*, 71 Iowa, 689. *Newman v. Covenant Mutual Benefit Association*, 72 Iowa, 242. *Rainsbarger v. Union Mutual Aid Association*, 72 Iowa, 191. *In re Protection Ins. Co.* 9 Bissell, 188. *In re Solidarite Association*, 68 Cal. 392. *Curtis v. Mutual Benefit Co.* 48 Conn. 98.

The various attachments, therefore, must all be dissolved, and the claimants of losses by death will take nothing from the safety fund in consequence of the death of the holders of the certificates under which they claim; and the safety fund must be divided among all the holders of certificates in force, or their legal representatives, in the proportion which the amount of each of their certificates (that is, the certificates of each) bears to the amount of the whole number of said certificates in force. The date to be adopted in taking this account will be the date of the filing of the bill for the dissolution of the association, namely, November 3, 1885. The subsequent proceedings in the cause relate back to that date. *Atlas Bank v. Nahant Bank*, 23 Pick. 480, 489. *Mayer v. Attorney General*, 5 Stew. (N. J.) 815. It must therefore be ascertained by reference to a master, if necessary, what was the whole amount of certificates then in force, and the amount of certificates then held by each holder, so that each may receive his percentage of the net amount to be divided.

Certain matters of detail may be mentioned, with a view to avoid future questions. The legal representatives of holders of certificates who died without having incurred any forfeiture, and who have not had any benefit from an assessment, though not

entitled to maintain any claim upon the safety fund in consequence of such death, will share in the division of the safety fund with other holders of certificates in force. By the third condition upon the certificates, the same are to be null and void if either the monthly dues, assessments, or the payment of ten dollars towards the safety fund, are not paid to the association on the day due. The monthly dues, by the second condition, are twenty-five cents on each certificate for expenses, payable on the first day of each month, so long as the certificate remains in force. This payment for expenses means the expenses of carrying on the business of the association, and would cease to be due when the association ceased to carry on business. If, then, the association stopped business on May 20, 1885, — as we infer from the averments of the bill, though the fact is not distinctly stated and nowhere clearly appears in the papers before us, — a certificate would not be forfeited by the failure to pay the monthly dues after that date. In respect to the payment of ten dollars towards the safety fund, it might happen that the year from the date of the certificate had not expired on November 3, 1885, so that the holder was not in default on that date. In such case, in order that his certificate may be treated as then in force, so as to entitle him to share in the division of the safety fund, it must be made to appear that the payment of the ten dollars was made within the year, though after that date; as it would be manifestly contrary to the true intent of the contract to allow holders to share in the division of the safety fund who had contributed nothing towards it. Non-payment of any assessment duly made prior to November 5, 1885, within thirty days from the day on which the notice of such assessment bore date, would invalidate a certificate. This implies, however, that due notice of such assessment was given, as provided in condition No. 4.

By the terms of the certificates, the association, upon a division of the safety fund, was to be entitled to the reasonable charges and expenses for the management and control of the same, and this must be ascertained by the master, as directed by the single justice. It is to be observed, that only so much is to be retained for this purpose as will pay the reasonable charges and expenses for the management and control of said fund, which was all

deposited with the Boston Safe Deposit and Trust Company; and under this head general expenses of the association are not to be included, or at any rate no more than would be a proper proportion for the management and control of said fund.

It has been suggested by the receiver, that assessments for losses by death may now be made under an order of the court. In answer to this, it is sufficient to say that none of the holders of claims for such losses have made any application, either to the association or to the court, for such an assessment; and besides, it is expressly found by the justice before whom the cause was heard, that it would be futile to attempt to obtain any moneys with which to pay death claims by means of general assessments. This relieves us from the necessity of entering upon the consideration of the question, whether under other circumstances the court could or would order such assessment to be laid, in the course of winding up an association of this peculiar character, and how far such a method of proceeding should be carried, — a question clearly of some difficulty. See *In re Protection Ins. Co.* 9 Bissell, 188.

A decree will be entered directing the Boston Safe Deposit and Trust Company to transfer the safety fund to the receiver, to be divided in pursuance of the foregoing opinion; and the reasonable costs and expenses incident to this litigation may be allowed by a single justice out of the fund.

Decree accordingly.

MARY J. COOPER vs. JOHN F. COOPER & another.

Suffolk. March 8, 1888. — September 5, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Implied Contract — Services as supposed Wife — False Representations — Administrator.

If a woman goes through a form of marriage, and lives with a man as his wife for many years, performing all the duties of that relation, and, after his death, learns for the first time that he had a wife living and not divorced from him; she cannot recover from his administrator for her services as housekeeper under an implied contract with the intestate.

CONTRACT against the administrators of the estate of James W. Cooper, to recover for services rendered by the plaintiff as housekeeper to the intestate.

At the trial in the Superior Court, before *Bacon, J.*, it appeared in evidence that in January, 1869, the intestate and the plaintiff went through with a form of marriage, and subsequently lived together as husband and wife. She believed herself to be his lawful wife, until the death of the intestate, in July, 1885, when she learned for the first time that he had a lawful wife living, from whom he had been separated for many years, and from whom he had not been divorced. The plaintiff testified, that after the form of marriage between herself and the intestate she lived with him as his wife, and had one child by him; that she kept house for him until he died, and never received anything for her services; that she kept during a portion of the time from four to ten boarders, from the profits of which she gave to the intestate each week a stated sum, which he was to keep for her; that with her sister's help she did all the cooking, washing, and all the work of the house; that before her marriage to the intestate, and before she lived with him as his wife, he told her that he had been married before, but that his wife had been away from him for twenty years, and that he was divorced from her. Other witnesses testified, that the plaintiff had for many years done most of the work in the house in which the intestate and herself lived, and that they lived as husband and wife; that for several years, while the intestate was in ill health, the plaintiff was wont to carry him food to the place where he worked; and that she kept his house neat and clean.

The judge ruled that the evidence did not show any express contract to pay for the services of the plaintiff, and that when the parties lived together as husband and wife there could be no implied contract to pay for the same; and directed a verdict for the defendants. The plaintiff alleged exceptions.

S. B. Allen, for the plaintiff.

W. B. French, for the defendants.

W. ALLEN, J. The plaintiff and James W. Cooper intermarried in the year 1869, and lived together as husband and wife until his death, in 1885. After his death the plaintiff

learned that a former wife, from whom he had not been divorced, was living, and brought this action of contract against his administrator to recover for work and labor performed by her as housekeeper while living with the intestate. The court correctly ruled that when the parties lived together as husband and wife there could be no implied promise by the husband to pay for such work. The legal relations of the parties did not forbid an express contract between them; but their actual relations, and the circumstances under which the work was performed, negatived any implication of an agreement or promise that it should be paid for. *Robbins v. Potter*, 11 Allen, 588; *S. C.* 98 Mass. 582.

The case at bar cannot be distinguished from that cited, unless upon the grounds that the plaintiff believed that her marriage was legal, and that the intestate induced her to marry him by falsely representing that he had been divorced from his former wife. But the fact that the plaintiff was led by mistake or deceit into assuming the relation of a wife has no tendency to show that she did not act in that relation; and the fact that she believed herself to be a wife excludes the inference that the society and assistance of a wife which she gave to her supposed husband were for hire. It shows that her intention in keeping his house was to act as a wife and mistress of a family, and not as a hired servant. There was clearly no obligation to pay wages arising from contract; and the plaintiff's case is rested on the ground that there was an obligation or duty imposed by law, from which the law raises a promise to pay money, upon which the action can be sustained.

The plaintiff's remedy was by an action of tort for the deceit in inducing her to marry him by false representations, or by a false promise. *Blossom v. Barrett*, 37 N. Y. 434. The injury which was sustained by her was in being led by the promise, or the deceit, to give the fellowship and assistance of a wife to one who was not her husband, and to assume and act in a relation and condition that proved to be false and ignominious. The duty which the intestate owed to her was to make recompense for the wrong which he had done to her. It is said that from this duty the law raised a promise to pay her money for the work performed by her in housekeeping. The obligation

to make compensation for the breach of contract could be enforced only in an action upon the contract. The obligation to make recompense for the injury done by the tort was imposed by law, and could be enforced only in an action of tort; it was not a debt or duty upon which the law raised a promise which would support an action of contract. The same act or transaction may constitute a cause of action both in contract and in tort, and a party may have an election to pursue either remedy. In that sense he may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained. *Jones v. Hoar*, 5 Pick. 285. *Brown v. Holbrook*, 4 Gray, 102. *Ferguson v. Carrington*, 9 B. & C. 59. See also Met. Con. 9, 10; 1 Chit. Con. (11th Am. ed.) 87; *Earle v. Curn*, 130 Mass. 596; *Milford v. Commonwealth*, 144 Mass. 64.

But the objection to maintaining the plaintiff's action lies deeper. The work and labor never constituted a cause of action in tort. The plaintiff could have maintained no action of tort against the intestate for withholding payment for the work and labor in housekeeping, or for by false representations inducing her to perform the work without pay. The particular acts which she performed as a wife were not induced by the deceit, so that each would constitute a substantive cause of action, but by the position which she was deceived into assuming, and would be elements of damage in an action for that deceit. Labor in housekeeping was a small incident to a great wrong, and the intestate owed no duty, and had no right to single that out and offer payment for it alone; and the offer to do so might well have been deemed an aggravation of the injury to the plaintiff.

We have been referred to *Higgins v. Breen*, 9 Mo. 493, and *Fox v. Dawson*, 8 Martin, 94, as decisions contrary to the conclusion which we have reached. It does not appear upon what ground the latter case was decided. The former was decided in favor of the defendant, the administrator, upon technical grounds; but the question of his liability was considered. It was assumed that an action of contract could have been maintained against the intestate for work and labor, and the question

discussed was whether the action would survive against his administrator, and it was held that it would. Upon the evidence in the present case, we think that no action, certainly no action of contract for the cause of action declared on, could have been maintained against the intestate. Even if the intestate had been liable in tort, we are not prepared to assent to the proposition that an action of contract will lie against an administrator for a tort of his intestate for which no action of contract could have been sustained against him.

In the opinion of a majority of the court, the entry must be,
Exceptions overruled.

COMMONWEALTH vs. JAMES E. WELCH.

Berkshire. September 11, 1888. — September 24, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Intoxicating Liquors — Common Nuisance — License.

At the trial of a complaint for keeping and maintaining a common nuisance, to wit, a tenement used for the illegal sale and keeping of intoxicating liquors, it appeared that the defendant had a license of the first class, under the Pub. Sta. c. 100, § 10, to sell such liquors in a front room; that he had no license as an innholder; and that during the time alleged he stored in an unconnected rear room large quantities of liquors, which were kept for sale under the license in the front room, and not otherwise. *Held*, that the keeping of the liquors in the rear room was illegal, and that the defendant was liable for keeping and maintaining such a nuisance.

COMPLAINT to the District Court of Northern Berkshire against the defendant, for keeping and maintaining a common nuisance, to wit, a certain tenement in North Adams used for the illegal sale and keeping for sale of intoxicating liquors, from May 1, 1887, to December 16, 1887.

At the trial in the Superior Court, before *Hammond, J.*, the jury returned a verdict of guilty, and the judge reported the case for the consideration of this court. The facts appear in the opinion.

C. J. Parkhurst, (*A. W. Preston* with him,) for the defendant.
A. J. Waterman, Attorney General, for the Commonwealth.

MORTON, C. J. It appeared at the trial, that the defendant had a license of the first class, under the Pub. Sts. c. 100, § 10, to sell intoxicating liquors in a certain room in a building called the Mansion House in North Adams, which room was particularly designated and described in the license; that he had no license as an innholder; that during a part of the time covered by the complaint he kept and stored large quantities of intoxicating liquors in a rear room adjoining the room specified in the license, but having no connection or communication with it, which liquors were kept for the purpose of being sold under the license in the room specified therein, and not otherwise. We assume, in favor of the defendant, though it is not directly stated, that he had a license as a common victualler.

We are of opinion that the Superior Court rightly ruled that such keeping in the rear room was illegal. The statute provides that a license of the first class shall be issued only to persons who hold a license as an innholder or a common victualler, and that it "shall specify the room or rooms in which such liquors shall be sold or kept by a common victualler." It further provides that "no person licensed as aforesaid, and not licensed as an innholder, shall keep, sell, or deliver any such liquors in any room or part of a building not specified in his license as aforesaid." Pub. Sts. c. 100, § 9, cl. 5. This last provision is not merely a condition of the license, but is a substantive provision relating to premises not covered by the license, and a violation of it is punishable under the Pub. Sts. c. 100, § 18.

It is a part of the scheme of the statute, that the public officers may at any time enter upon the licensed premises to ascertain the manner in which the business is conducted, and to examine the quality and purity of the liquors kept for sale. Pub. Sts. c. 100, § 15. This furnishes a reason why all liquors kept for sale should be kept in the licensed premises, which are open to the inspection and examination of the public officers. But whatever may be the reason, the statute is explicit, and clearly prohibits a licensee of the first class from keeping liquors intended for sale in any other place except the room or rooms specified in the license. It follows that, upon the facts of this case, the defendant was guilty of the illegal keeping of intoxicating liquors in the rear room, and that he is liable to a com-

plaint or indictment under the Pub. Sts. c. 101, §§ 6, 7, which provides that whoever keeps or maintains a tenement used for the illegal keeping or sale of intoxicating liquors shall be liable to the penalty therein specified.

Judgment on the verdict.

COMMONWEALTH vs. MARY WHALEN.

Berkshire. September 11, 1888. — September 27, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Intoxicating Liquors — Common Nuisance — Error in District Court —
Jurisdiction of Superior Court on Appeal — Evidence.*

Error in the proceedings upon a complaint in a District Court is no ground for dismissing the complaint on appeal.

At the trial, on appeal, of a complaint for keeping and maintaining a common nuisance, to wit, a certain tenement used for the illegal sale and keeping for sale of intoxicating liquors, an officer testified that during the time alleged he seized on the defendant's premises upon a search-warrant a cask of liquor, and on cross-examination stated, without objection, that it was returned by order of the court, the record of which was not introduced. The presiding judge recalled the jury, after they had left their seats at the close of the charge, and directed them to disregard the fact of such return, because the record was not in evidence, but did not allude to the seizure. *Held*, that the direction was erroneous.

COMPLAINT to the District Court of Northern Berkshire against the defendant and Thomas Whalen, for keeping and maintaining a common nuisance, to wit, a certain tenement in North Adams used for the illegal sale and keeping for sale of intoxicating liquors from October 13, 1887, to March 6, 1888.

In the Superior Court, on appeal, the defendant seasonably filed a plea in abatement, and a motion to dismiss the complaint, both reciting, in substance, that the Superior Court had no jurisdiction, because the defendant was improperly tried in the District Court, and that its judgment and the sentence rendered thereon were illegal and void. At the hearing on the plea in abatement, it appeared in evidence, or was admitted, that on March 19, 1888, the case came on for trial against the defendant and Thomas Whalen, who was her husband, in the absence

of the defendant, who claimed to be sick; that she never requested that she might be tried in her absence; and that her counsel, who was also counsel for Thomas Whalen, never consented or agreed that her trial should proceed in her absence; that her absence from the court-room was not discovered until the case had been fully tried; that Thomas Whalen was discharged, and the case as against the defendant was continued until the next day; that on March 20, 1888, the defendant was arrested and brought before the District Court upon a warrant issued upon a complaint for the unlawful keeping of intoxicating liquors; that thereupon a *nolle prosequi* was entered as to that complaint; and that immediately thereafter she was adjudged guilty, and sentenced to fine and imprisonment. *Hammond, J.*, overruled both the motion to dismiss and the plea in abatement.

At the trial, the government was permitted to introduce, against the objection of the defendant, certain evidence which is not now material.

The complainant testified that, as an officer within the period named in the complaint, he went to the house where the defendant and her husband lived, with a search-warrant, for the purpose of searching the premises and seizing any intoxicating liquors unlawfully kept there; that he found in a coal shed in the rear of the house, the key of which was found in the defendant's possession, a box containing a cask or keg of liquor, which was full and had never been opened; and that he seized this keg by virtue of the warrant and took it away. Upon cross-examination he testified that it was returned by order of court, no record of which was introduced; and that he did not return it, but caused it to be sent back. At the close of the charge to the jury, and after the jury had left their seats and had started to go to their room, the judge called them back, and instructed them that they should disregard the fact that the keg or cask of liquor seized was returned; that, if it was returned by order of court, the record of the court was the proper evidence of the same; and that, there being no record of the court in evidence, and the reasons for the order not appearing in evidence, the jury should disregard the fact that the liquor seized was returned. The jury returned a verdict of guilty; and the defendant alleged exceptions.

E. M. Wood & M. E. Couch, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

DEVENS, J. Assuming in favor of the defendant's contention, that Mary Whalen could not properly have been found guilty of the offence charged against her, and sentenced therefor, without other and further hearing than that which she received from the District Court, this irregularity could not operate to deprive the appellate court of its jurisdiction, or afford ground for sustaining the defendant's plea in abatement, or motion to dismiss. The District Court had jurisdiction of the subject matter of the complaint, and of the person of the defendant, even if the defendant was also brought before it upon a warrant issued upon another complaint, which was not further prosecuted. It had a right to inquire into the facts, to apply the law, and to impose the proper sentence. If its judgment was erroneous, an appeal could be taken for the purpose of avoiding the effect of it. Such appeal in the case at bar vacated the judgment of the District Court, rendered immaterial all errors and irregularities in the proceedings there, and gave the defendant her full rights in the court above, as the whole case was thus opened there as to the law, the facts, and the judgment. *Commonwealth v. O'Neil*, 6 Gray, 343. *Commonwealth v. Tinkham*, 14 Gray, 12. *Commonwealth v. McCormack*, 7 Allen, 532. *Commonwealth v. Calhane*, 108 Mass. 431. *Commonwealth v. Sheehan*, 108 Mass. 432, note. *Commonwealth v. Harvey*, 111 Mass. 420. *Commonwealth v. Holmes*, 119 Mass. 195. *Commonwealth v. Fredericks*, 119 Mass. 199.

In *Commonwealth v. Tinkham*, *ubi supra*, it was held that, assuming that the plea of the defendant did not authorize the sentence passed by the magistrate, no reason was shown for discharging the defendant, or dismissing the case brought by him to the Court of Common Pleas by appeal, but that it was the duty of that court to try the case upon the appeal under a proper plea. The Superior Court had therefore jurisdiction to try the case at bar on the appeal.

We do not discuss the several exceptions to the admission of evidence taken by the defendant, as upon a single ground we are of opinion that there should be a new trial; and the evidence then presented may render such discussion superfluous.

The complainant testified that he was an officer within the

period named in the complaint, that he went to the premises of the defendant and her husband, described the finding of a cask of liquor there, and the place where and the circumstances under which it was found. He further added, that he seized this cask and took it away. On cross-examination, he testified, without objection, that it was returned by order of the court, he himself causing it to be sent back. No record was introduced as to this matter. At the close of the charge, and after the jury had left their seats, the presiding judge recalled them, and directed them "to disregard the fact that the keg or cask of liquor had been returned; that, if it was returned by order of the court, the record was the proper evidence of the same, and there being no record of the court in evidence, and the reasons for the order not appearing in evidence, that the jury should disregard the fact that the liquor seized was returned." To this the defendant duly excepted, and we think the direction was erroneous.

The officer had not been limited to the mere statement of the circumstances under which he had found liquor on the defendant's premises. He had been permitted to testify, without objection by the defendant, and apparently without producing any search-warrant, that he had seized and taken it away on his warrant. He had thus placed it in legal custody. When he further testified, without objection by the government, and when the court had received the evidence, that it was returned by order of court, the presiding justice could not properly, after the close of the charge, instruct the jury to disregard the fact. It is true, that the order of the District Court could properly only have been proved by the production of a properly attested copy of the record. The evidence might, therefore, have been refused when offered. But when no objection on that account had been made, and when the evidence had been received, it should not have been rejected, after the evidence, and indeed the whole case, had been completely closed. It may well have been that the defendant, by the acceptance of the parol evidence of what the record contained, had deemed it unnecessary to put in a properly attested copy. Even if the evidence as presented by him failed to show the reasons why the District Court had ordered a return, this went to its weight rather than to its competency, and the record itself, if produced, might not have disclosed them.

If, independently of or in addition to the facts and circumstances under which a cask of liquor had been found on the defendant's premises, it was competent to show, as against the defendant, that the cask had been actually seized on a search-warrant,—which may be doubted, as the seizure is not an act of the defendant, nor is he bound by the judgment of the officer who makes it,—it was also competent on the part of the defendant to diminish its force by showing that it had been returned to him by order of the court. If the learned judge had ordered both the evidence of the seizure and the return to be struck out, and left this part of the case to be considered by the jury only on the facts and circumstances, testified to by the officer, which attended his discovery of the cask of liquor on the defendant's premises, the defendant would perhaps have had no ground of exception. But when the evidence that the liquor was seized on a search-warrant was permitted to remain, unless proper evidence that it was returned is competent, injustice would be done to the defendant.

For these reasons, the evidence as originally given on this point was proper to be considered by the jury.

Exceptions sustained.

COMMONWEALTH vs. GEORGE L. HOULE.

Berkshire. September 11, 1888. — September 27, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Intoxicating Liquors — Sale by Servant in Master's Absence — Perjury.

At the trial of an indictment for keeping and maintaining a common nuisance, to wit, a tenement used for the illegal sale and keeping for sale of intoxicating liquors, the testimony of witnesses as to sales by the defendant in person, as well as by his bar-tender in the former's absence, was direct. The presiding judge left entirely to the jury the weight of the evidence, and the inferences therefrom, as to whether the sales by the bar-tender were made with the approval and under the authority of the defendant, and further instructed them that, if they could explain the evidence on any other theory consistent with the defendant's innocence than that the witnesses had committed perjury, it was their duty to do so, and that the question was left to them. *Held*, that the defendant had no ground of exception.

, INDICTMENT alleging that the defendant kept and maintained a common nuisance, to wit, a certain tenement in Pittsfield, used for the illegal sale and keeping for sale of intoxicating liquors.

At the trial in the Superior Court, before *Hammond, J.*, it appeared in evidence that the defendant had a license as an innholder, and that he also had a license of the first class and another of the fourth class, under the Pub. Sts. c. 100, § 10, to sell intoxicating liquors at his hotel in Pittsfield, being the tenement in question. The government called as witnesses four minors, all of whom testified that they had purchased and drank liquors at the hotel during the time alleged. Two of these witnesses testified that they purchased liquors of the defendant in person, and the other two testified that they bought liquors of the bar-tender of the defendant in the latter's absence. The defendant introduced evidence tending to show that he had instructed the bar-tender not to sell liquors to minors, or in violation of any provision of his license, and that one of the witnesses, who testified that he purchased liquors of the defendant in person, had in fact purchased them of the bar-tender, and had so testified on a different occasion.

The defendant asked the judge to instruct the jury, that, if they should find that the sales testified to by the government witnesses were made by the bar-tender, without the knowledge or consent of the defendant, and against his instructions, then the jury must return a verdict of not guilty. The judge refused so to instruct, and instructed the jury that the question whether the defendant was sincere in his instructions, and whether they were given in good faith to his bar-tender, was for them, and that they must say whether he was so sincere; that if a sale of intoxicating liquors in the hotel, during the time alleged in the indictment, by any person employed by the defendant to sell liquor at said hotel, was made without the defendant's knowledge, and the defendant in no way participated in, approved, or countenanced such sale, the defendant would not be responsible for such sale, but that, nothing to the contrary appearing, evidence of a sale by a servant in his master's shop of his master's goods there kept for sale would, if believed, warrant the jury in finding that the sale was authorized by the master, and that this

would be so although the defendant was not on the premises at the time the sale was made; that the whole question of authority was one for the jury, under all the circumstances of the case, and that there was no presumption of law either way. The judge also instructed the jury, that there would seem to be no other way consistent with the defendant's innocence for them to explain the testimony of the young men who had testified for the Commonwealth, than upon the theory that these young men had committed perjury, and it was for them to say whether or not they believed this to be the fact.

At the close of the charge to the jury, the defendant's counsel stated that he desired to except to the latter portion, among others, of the charge; whereupon the judge stated that he would modify what he had said about perjury, and instructed the jury that, if they could explain the testimony of the witnesses upon any other theory than that they had committed perjury, it was their duty to do so, and that he would leave that question to them without expressing any opinion as to whether it could be so explained.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. Turtle, (H. C. Joyner with him,) for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

DEVENS, J. The defendant held a license of the first class and fourth class to sell intoxicating liquors at his hotel, which was the place he was indicted for keeping and maintaining as a common nuisance. The Commonwealth sought to establish its case by proving several sales of liquor to minors, made by the bar-keeper of the defendant, as well as by the defendant in person, at the hotel in question. While the jury were instructed that the defendant would not be responsible for sales made by his bar-keeper if made without his knowledge, the defendant in no way participating therein, nor approving nor countenancing such sales, they were further instructed, "that, nothing to the contrary appearing, evidence of a sale by a servant in his master's shop of his master's goods there kept for sale would, if believed, warrant the jury in finding that the sale was authorized by the master, and that this would be so although the defendant was not on the premises at the time the sale was made." The

instruction also submitted to the jury the whole question of the authority of the bar-keeper, under all the circumstances of the case, stating that there was no presumption of law either way. This left the weight of the evidence offered by the Commonwealth, and the inferences to be drawn from it, entirely to the jury, and is in accordance with the view expressed in *Commonwealth v. Briant*, 142 Mass. 463. It was as a question of fact solely that the jury were to determine whether an authorized sale by the bar-keeper had been proved, and the jury were permitted to make this inference, if, under all the circumstances, they should see fit to do so. In *Commonwealth v. Hayes*, 145 Mass. 289, it is also intimated that instructions precisely similar to those given in the case at bar would be unobjectionable.

The instruction of the court, that there would seem to be no other way consistent with the defendant's innocence by which the testimony of the witnesses could be explained, than upon the theory that they had committed perjury, was distinctly modified by the court, and the jury were then instructed that, if they could explain the testimony of these witnesses upon any other theory than that they had committed perjury, it was their duty to do so, and that this question was left to them. Whether the instruction as originally given was correct need not be considered, as the jury must have understood it to have been withdrawn, and the instruction subsequently given to have been substituted therefor. *Commonwealth v. Clifford*, 145 Mass. 97. As finally given, we see no objection to it; indeed, the instruction was, so far as it went, favorable to the defendant. The testimony of the witnesses had been direct as to the sales; the instruction made it the duty of the jury, if this testimony could be explained upon any other theory than that of perjury, thus to explain it for the benefit of the defendant.

The whole charge is not before us, but only such part as the defendant has selected for exception. It is not to be inferred that the court failed to instruct the jury that the defendant was to be presumed innocent, and that it was for the Commonwealth to prove his guilt beyond reasonable doubt. Still less is it to be inferred, that, because the jury were told that, if the direct evidence could be explained upon any other theory than that of

perjury, it should be so explained, they were not also made fully to understand that, if the witnesses for the Commonwealth failed to command their confidence, or were in their opinion guilty of perjury, the defendant was entitled to an acquittal.

Exceptions overruled.

ANSEL WRIGHT vs. LUCIEN A. DAWSON.

Hampshire. September 18, 1888. — October 1, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Receipt for Personalty attached — Insolvency of Judgment Debtor —
Discharge of Receptor.*

If the receptor for property attached permits it to go back into the hands of the debtor, who files a petition in insolvency within four months after the attachment, and his assignee takes the property and applies its proceeds for the benefit of the creditors, no action can be maintained on the receipt.

CONTRACT upon a receipt, signed by the defendant, for certain personal property attached by the plaintiff, a deputy sheriff. Trial in the Superior Court, without a jury, before *Blodgett, J.*, who found the following facts.

On April 14, 1880, the plaintiff attached on a writ against one Parsons, in an action of contract, the personal property described in the receipt. On April 16, 1880, the plaintiff took from the defendant the receipt by which the defendant agreed to keep the property safely, and redeliver it on demand, or, if no demand, to redeliver it within thirty days of the rendering of judgment in the action against Parsons, so that the same might be taken on execution. The property covered by the receipt was allowed by the defendant to go back into the hands of Parsons. On August 9, 1880, Parsons filed a voluntary petition in insolvency, and was duly adjudged an insolvent, the first publication of notice being made on August 10, 1880, but was, after a hearing, refused a discharge. The property was taken by the messenger in insolvency, and by him delivered to the assignee in insolvency, who disposed of it for the benefit of creditors, the attachment not being continued under any order of court. On

April 19, 1887, judgment was recovered in the action named in the receipt against Parsons, and within thirty days thereafter execution was placed in the hands of the plaintiff for satisfaction.

Upon the above facts, the judge ruled that the action could not be maintained, and found for the defendant; and the plaintiff alleged exceptions.

J. A. Wainwright, for the plaintiff.

D. W. Bond, for the defendant.

MORTON, C. J. This is an action upon a receipt given by the defendant to the plaintiff, who, as a deputy sheriff, had attached certain personal property owned by one Parsons on a writ against him. By the receipt, the defendant undertakes to keep the property safely, and to redeliver it to the plaintiff on demand, and, if no demand, to redeliver it within thirty days of the rendering of judgment in the suit against Parsons, so that the same may be taken on execution.

It is settled that under such a receipt the receiptor is not under an absolute liability to redeliver the property; but it may be stated as a general rule, that he is entitled to prove as an excuse for not delivering it, and as a defence to an action upon the receipt, any state of facts which shows that the officer is not under any liability either to apply the property to the debt of the attaching creditor, or to return it to the debtor or other owner. Thus, he may show as a defence that the property has been taken from him by the real owner by virtue of a paramount title. *Learned v. Bryant*, 13 Mass. 224. *Denny v. Willard*, 11 Pick. 519. Or that it was exempt from attachment, and has been given up to the debtor. *Thayer v. Hunt*, 2 Allen, 449. Or that the attachment was dissolved by the insolvency of the debtor. *Sprague v. Wheatland*, 3 Met. 416. *Grant v. Lyman*, 4 Met. 470. *Andrews v. Southwick*, 13 Met. 585. *Butterfield v. Converse*, 10 Cush. 317. *Shumway v. Carpenter*, 13 Allen, 68. *Lewis v. Webber*, 116 Mass. 450. These cases proceed upon the ground that the liability of the receiptor is of a peculiar character; he is a mere bailee of the officer, who can enforce the promise of his bailor to deliver the goods only so far as is necessary to relieve himself from liability to any party interested in the attachment.

Applying these principles to the case at bar, it is clear that the plaintiff cannot maintain his action. He is not liable over to any person for the property. He is not liable to the debtor, for the property has been applied to his use in the payment of his debts; nor to the assignee in insolvency, because he has received the property and disposed of it for the benefit of the creditors of the judgment debtor. He is not liable to the attaching creditor, because he had no right to take the property and apply it to his own debt, thus gaining a preference over the other creditors of the debtor. The debtor filed his petition in insolvency within four months after the attachment; the effect of this was to dissolve the attachment, if any existed, and take away the right of the creditor to have this property applied to his debt.

The plaintiff contends that, as the receiptor allowed the property to go back into the hands of the debtor before the insolvency proceedings, the attachment was thereby dissolved, so that the insolvency proceedings did not operate upon it. It is not necessary to decide whether this act of the receiptor operated to discharge the attachment for all purposes, because upon the facts of this case it is immaterial. The ground upon which an officer is liable is, that he has been negligent in keeping the property, and that the attaching creditor has thereby sustained injury. *Grant v. Lyman*, 4 Met. 470. But if we assume that the act of the receiptor discharged the attachment before the insolvency, yet the creditor was not in any way injured by such act. Whether the attachment was discharged or not, the property lawfully belonged to the assignee, and he has received it and rightfully applied it to the benefit of the general creditors of the debtor. The attaching creditor has sustained no injury by the act of the receiptor, and cannot, by a suit in the name of the officer, hold him liable.

It follows that the Superior Court rightly ruled that, upon the facts proved, this action could not be maintained.

Exceptions overruled.

KATE SULLIVAN vs. DENNIS HURLEY.

Hampshire. September 18, 1888. — October 1, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Bastardy Complaint — Evidence — Admissions in Letters.

At the trial of a complaint under the bastardy act, Pub. Sts. c. 85, letters of the respondent to the complainant, written at intervals after the alleged begetting and before her delivery, which tend to show a suspicious intimacy between them and contain expressions fairly leading to the inference of their prior criminal intercourse, are admissible in evidence, in the discretion of the presiding judge.

COMPLAINT under the bastardy act, Pub. Sts. c. 85.

At the trial in the Superior Court, before *Brigham*, C. J., the complainant introduced evidence tending to show that she was delivered of a full time bastard child on February 28, 1888; and that the respondent had sexual intercourse with her on the last of May, 1887, at which time the child was begotten. The complainant was then permitted to introduce in evidence, against the respondent's objection, certain letters written by him to her on August 17, 1887, on December 10, 1887, and on January 4, 1888. These letters, which were those of a very illiterate person, alluded to the pregnancy of another woman, and contained expressions evidently referring to the intercourse of the sexes and to the respondent's desire to have such intercourse, and in them the respondent further expressed the hope that, when he should visit the complainant, he would find her "alone, so we can have a good time," and offered to give the complainant "bed room" if she would come and see him on some night.

The judge instructed the jury as to these letters as follows: "The letters which were written by this defendant to the plaintiff, after the time within which this child must have been begotten, are not to be considered as evidence of the paternity of the child, unless you find in them some language which recognizes or acknowledges sexual intercourse between the writer and the girl to whom the letters were written, either before or after the time when the child must have been begotten."

The jury returned a verdict of guilty; and the respondent alleged exceptions.

W. W. Rice & H. W. King, (C. M. Rice with them,) for the respondent.

H. C. Davis, for the complainant.

BY THE COURT. In support of the complainant's testimony, that the respondent had sexual intercourse with her in May, 1887, it was competent for her to put in evidence any acts or declarations of the respondent, either before or after the alleged intercourse, which show the relations between the parties, and which tend to show that at the time of the alleged intercourse a criminal disposition existed between them. *Thayer v. Thayer*, 101 Mass. 111. *Beers v. Jackman*, 103 Mass. 192.

In the case at bar, the letters of the respondent to the complainant which were admitted in evidence show a suspicious intimacy between them which was necessarily the result of their previous acquaintance and relations; they contain expressions which could hardly be used between persons whose relations were innocent, and which fairly lead to the inference that the parties had been guilty of criminal intercourse. They were therefore admissible, within the discretion of the presiding judge.

Exceptions overruled.

LUCIEN B. COPELAND vs. ANNA W. BARNES.

Hampshire. September 25, 1888. — October 2, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Delivery of Bill of Sale as Collateral Security — Insolvent Debtor — Preferences.

A buyer of goods gave, as security to one who lent him the purchase money, a bill of sale thereof running to himself, the lender supposing it to be a mortgage, and subsequently, but within six months of his going into insolvency, gave a mortgage thereof to the lender, who afterwards took possession of the goods. *Held*, that giving the bill of sale amounted to no more than an agreement for a pledge or mortgage, and that the mortgage when given was within the Pub. Sta. c. 157, § 98, as to preferences by an insolvent debtor.

REFLEVIN of certain goods, brought by the assignee in insolvency of Charles A. Wright.

At the trial in the Superior Court, before *Blodgett, J.*, the defendant introduced evidence tending to prove that on March 9, 1886, Wright, who was the son of the defendant, bought certain personal property, and took from the seller a bill of sale thereof running to himself; that the defendant lent to Wright the purchase money and took his promissory note therefor; that at the same time Wright delivered to the defendant the bill of sale as security for the note, the defendant supposing it to be a mortgage; that on December 21, 1886, the defendant learned for the first time that the bill of sale was not a mortgage, and demanded and received from Wright a mortgage of the property in the usual form; that on February 20, 1887, the defendant took and retained possession of the property for non-payment of the note; that on March 10, 1887, Wright was duly adjudged an insolvent debtor, and the plaintiff was chosen assignee of his estate.

The defendant contended, first, that if the purchase money was paid, and the note and bill of sale were made and delivered, under the circumstances above set forth, and the defendant took possession of the property under the bill and mortgage before the insolvency proceedings were begun, it would constitute a defence to the action; and, secondly, that if the defendant did not, at the time the mortgage was made, have reasonable cause to believe that Wright was insolvent or in contemplation of insolvency, she would be entitled to a verdict.

The judge ruled that the above facts would not constitute a defence, and that the bill of sale was not competent as evidence; but also ruled that the facts might be introduced in evidence on the issue whether the defendant had reasonable cause to believe that Wright was insolvent or in contemplation of insolvency at the time the mortgage was delivered to her. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. B. O'Donnell, for the defendant.

J. C. Hammond & H. P. Field, for the plaintiff.

C. ALLEN, J. In this case it appears that Wright bought certain personal property, took a bill of sale, borrowed money

of the defendant, who was his mother, to pay the price, gave a note to her for the money, and delivered to her as security the bill of sale running to himself, she supposing it was a good security,—indeed, apparently supposing it was a mortgage. Afterwards, on December 21, 1886, upon learning that it was not a mortgage, she demanded and received a mortgage; and on February 20, 1887, took possession of the property. But these later transactions were both within six months before the commencement of the proceedings in insolvency.

The delivery of the bill of sale did not constitute a mortgage, even though supposed by both parties to be such. A bill of sale made for security, even though running directly to the person to be secured, and though accompanied by delivery of the goods, is at most only a pledge, and not a mortgage. *Shaw v. Silloway*, 145 Mass. 503, 505. *Thompson v. Dolliver*, 132 Mass. 103. If no delivery of the goods is made, it can be no more than an agreement for a pledge or mortgage. Such agreement, made at the time when a debt is contracted, will not avail to protect the actual pledge or transfer of the property, when made, from the operation of the statute against preferences by an insolvent debtor. The statute makes no exception in favor of securities given in pursuance of a previous agreement, but declares all transfers and conveyances void, if made within six months, and under the circumstances therein stated. Pub. Sts. c. 157, § 98. *Forbes v. Howe*, 102 Mass. 427, 435. *Simpson v. Carleton*, 1 Allen, 109, 120. *Blodgett v. Hildreth*, 11 Cush. 311.

Certainly the delivery to the defendant of the bill of sale running to Wright can have no greater effect than the execution and delivery of a bill of sale directly to the defendant. The facts were allowed to be put in evidence upon the question whether the defendant, at the time of taking her mortgage, had reasonable cause to believe that Wright was insolvent or in contemplation of insolvency, and that the conveyance was made in fraud of the insolvent laws; and, from the verdict of the jury, it must now be assumed that she then had such reasonable cause of belief.

Exceptions overruled.

LUCY A. PARKER vs. CITY OF SPRINGFIELD.

Hampden. September 25, 1888. — October 9, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Personal Injuries — Highway Defect — Due Care — Exceptions.

No exception lies to the refusal to give an instruction in the language requested, if it is fully covered by the instructions given.

If a casual and not strictly accurate statement of law, made by the presiding judge at a trial to counsel while arguing, does not, when construed in connection with proper instructions to the jury, modify or qualify them, no exception lies thereto.

TORT for personal injuries occasioned to the plaintiff by an alleged defect in Union Street in the defendant city.

At the trial in the Superior Court, before *Brigham*, C. J., evidence was introduced tending to show that the plaintiff, who was sixty-two years of age, was proceeding along the sidewalk on Union Street, a highway which the defendant was bound to keep in repair, on her way to market, at about eleven o'clock in the forenoon of February 15, 1887; that a ridge of ice about one and a half feet wide and from four to five inches thick extended lengthwise along the centre of the sidewalk, which was seven feet wide; that this ridge was bounded on either side by glare ice not formed into ridges; that the plaintiff, in attempting to cross the ridge of ice in order to support herself by the fence on the inner edge of the sidewalk, fell, and received the injuries; that the plaintiff had passed along the sidewalk twice on the day before, and then knew its condition, having seen the ridge of ice, and having taken hold of the same fence as she passed along; and that a companion of the plaintiff, as she was going along the sidewalk on that day, called her attention to the ridge of ice, and told her to be careful.

On the issue of due care, the plaintiff asked the judge to rule as follows: "1. That the fact that the plaintiff knew that a ridge of ice, dangerous in its character, existed at the place of injury, does not conclusively prove negligence on her part in attempting to pass over it; and if she had reasonable cause to believe that she could pass in safety over it, and used reasonable

care in the attempt, she might recover. 2. That it cannot be said, as matter of law, that the plaintiff was bound to have her attention directed, at the moment of danger, to the alleged defect."

The court refused so to rule, and instructed the jury as follows: "This question of care in a traveller is evidently a fit one for a jury to determine. Of course, it depends upon the peculiar circumstances of any person travelling. What would be care in the summer would be negligence in the winter. What would be care going up hill would be gross negligence going down hill. And here the question arises. You are to take into account all the circumstances and conditions, and then determine whether that person, at the point of time to which the inquiry relates, and at the place to which the inquiry relates, was acting as a person of ordinary caution and prudence would have acted under the same circumstances. Obviously, every man exercises care and caution in travelling, with reference to what he knows of the place where he travels. If he goes over it often, he exercises it with reference to the familiar features of the place he passes. If he goes over it for the first time, he applies his care to what he sees, to what is visible. The law does not require a man to travel in constant trepidation and solicitude lest he should come into a pitfall. The roads ought to be in such condition, as well as the sidewalks, that people can not only travel in safety, but travel without a constant solicitude lest they come to harm. But, on the other hand, no traveller can shut his eyes to defects injuring the travel, — defects which he daily sees, or which are obvious to him as he is going along. Now, how much did this plaintiff know of this place? If she had been over it on the day before, and had seen that it was dangerous, and had found the same condition of things upon the morning of her injury, that fact is to be taken into account in considering whether on that morning she was exercising proper care, reasonable care. If she used precautions in passing upon the day before, and, upon the morning of her accident, when there was the same occasion, she omitted them, that would be a question of fact bearing upon the question whether she was using proper prudence and care, in view of what she knew as to the risks of walking where she was. If she might have readily deviated

from a known place of danger, passing without inconvenience in the purpose of her travel along a safe place, and omitted to do that, that would be a fact bearing upon this same question. Because, gentlemen, it is a practical question. It is for the jury to get as nearly as it can to the exact facts of the situation of things, and then say, Was this party then and there in the exercise of due care? The fact that she saw it was slippery, the fact that she knew it was slippery, is not in and of itself decisive that she was careless in walking over it; but it is a fact which bears upon the question whether she was reasonably called upon to avoid an obviously risky place, and whether she could readily and easily have avoided it. These are the considerations which bear upon the question of care."

While the plaintiff's counsel was making his closing argument to the jury, and was stating the law of the case, he was interrupted by the judge, who said, "If a person knows a way to be dangerous when he enters upon it, he cannot, in the exercise of ordinary prudence, proceed and take his chance, and, if he shall actually sustain damage, look to the town for indemnity."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

W. B. Stone, for the plaintiff.

J. B. Carroll, for the defendant.

DEVENS, J. The request made by the plaintiff on the issue of due care,— that the court should instruct the jury that the fact that she knew that a ridge of ice, dangerous in its character, existed at the place where she was injured, did not conclusively prove negligence on her part in attempting to pass over it, and further, that, if she had reasonable cause to believe that she could pass in safety over it, and used reasonable care in the attempt, she might recover,— was not in terms given to the jury. But if the subject to which the attention of the court was called was fully covered by a correct and appropriate instruction, the plaintiff has no ground of complaint, even if that asked might also properly have been given. *Howes v. Grush*, 131 Mass. 207. *Deerfield v. Connecticut River Railroad*, 144 Mass. 325.

The instructions given submit to the jury, with great fulness, the question whether the plaintiff conducted herself as a person

of ordinary caution and prudence would have done in selecting the path on which she travelled, and in her method of travelling. They make the fact that she knew that a ridge of ice existed on the path, even if dangerous in its character, an element only in deciding this as a practical question. If she had passed over the place previously, and knew that it was dangerous, and if the same condition of things existed on the morning of the accident, these were facts which the jury were told to consider in deciding whether she used proper prudence and care, in view of what she knew, as to the risks of walking where she was actually travelling. In a similar manner, if the plaintiff knew that the way was slippery, the instruction was, that this fact was not in and of itself decisive that she was careless in walking over it, but bore upon the inquiry whether she was reasonably called upon to avoid an obviously dangerous place, or could readily have avoided it, which were to be considered in determining whether she was in the exercise of due care.

The plaintiff also requested the court to instruct the jury, that she was not bound, as matter of law, to have her attention directed at the moment of danger to the alleged defect. This instruction also was not given in terms, but the court left to the jury to determine whether, in view of what the plaintiff knew of the place where she was travelling, she had exercised due care and caution, stating that one was not required to travel in constant trepidation and solicitude, but, on the other hand, could not shut his eyes to defects which were obvious or could be readily seen. Whether the plaintiff ought to have had her attention directed to the defect at the time of the accident, was a question of fact, and submitted as such to the jury. These instructions, which were in a somewhat more amplified form than that in which we have stated them, were all that the case required. The plaintiff could not properly ask that the jury should be instructed that this or that specified fact should not be conclusive against her; it was sufficient if all the facts, including those to which her request called attention, were left to the jury on the question of the exercise of due care by her. *Green v. Boston & Lowell Railroad*, 128 Mass. 221. *De-laney v. Hall*, 130 Mass. 524. *Bugbee v. Kendrick*, 132 Mass. 349.

The plaintiff also contends, even if the instructions were in themselves unobjectionable, that the remark made by the presiding judge to the counsel while arguing the case, to which he excepted, is to be treated as an instruction, and was erroneous, and so calculated to mislead as to entitle her to a new trial. The court then stated, "If a person knows a way to be dangerous when he enters upon it, he cannot, in the exercise of ordinary prudence, proceed and take his chance, and, if he shall actually sustain damage, look to the town for indemnity." This remark, as a full statement of the law on this subject, cannot be considered to be accurate. There are different degrees of danger, as there are defects in ways of a more or less serious character. As there are some defects which, if not rendering it absolutely impossible to pass over a way in safety, are such that only a reckless person would make the attempt, so there are others which would not prevent a prudent person from using the way, but would only impose upon him the duty of greater care and caution. It cannot, therefore, be said, that, if one knows a way to be in any degree dangerous, he can only use the highway at his own risk. Whether he acts prudently in attempting to use it, and takes the precautions he should in so doing, are questions for the jury.

But if the remark made by the judge is to be treated as a part of his instructions to the jury, it should be construed with those instructions. If it had actually been made as a part of his charge, it would readily be seen that the court did not undertake to qualify thereby those instructions which leave the whole question of the care exercised by the plaintiff to be determined in view of her knowledge of the state of things existing in the way as a matter of fact. It is stated that, if the plaintiff had seen that the way was dangerous, this was to be considered in determining whether she exercised due care, and the inference is obvious throughout the charge that the jury might still find that she exercised this care in entering on this way, even if she knew that it was defective and dangerous. In connection with the sentences which point out with clearness that the question on this part of the case was that of the plaintiff's care, the remark would readily have been seen to apply only where a way was so obviously and gravely dangerous that no prudent person

would have been justified in entering upon it for the purpose of travelling. If instructions, as a whole, are not erroneous, a party cannot sustain exceptions thereto, even if a single passage taken abstractly may be so. *Adams v. Nantucket*, 11 Allen, 203.

Nor do we think the jury could have been misled by it, although not made in immediate connection with the formal instructions of the charge. It was a casual observation, in reply to some position taken by the plaintiff which does not appear, and, if deemed by the jury to have been a part of their instructions, they must have construed it with those which made the plaintiff's knowledge of the dangerous character of the way only an element in determining whether she had conducted herself with due care.

Exceptions overruled.

THIRD CONGREGATIONAL SOCIETY OF SPRINGFIELD *vs.* CITY OF SPRINGFIELD.

Hampden. September 25, 1888. — October 9, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, & C. ALLEN, JJ.

Tax — Exemption — Parsonage of Religious Society not Exempt.

A parsonage, erected for a religious society on its land, and near its church edifice, for the use of its ministers as a dwelling-house exclusively, free of rent, is not, under the Pub. Sts. c. 11, § 5, cl. 3, 7, exempt from taxation.

CONTRACT to recover the amount of a tax assessed upon the real estate of the plaintiff, on May 1, 1887, and paid under protest. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, in substance as follows.

The plaintiff is a duly incorporated religious society, and is the owner of land and a church edifice thereon in Springfield. In 1886 another building was erected upon the land, and within a few feet of the church edifice, and was given to the society for use as a parsonage. No land was devoted to the use of such parsonage except that upon which it stands, and all the walks and driveways to and from the parsonage are the same as those

always used for ingress and egress from the church edifice. This parsonage since its completion has been occupied by the settled minister of the society, and used by him and his family as a dwelling-house, free of rent, under the following vote of the society: "That the pastor, Rev. John Cuckson, be allowed the use of the parsonage during his pastorate, free of rent, he paying water rates and making such repairs as tenants are liable to make." The salary of such minister has remained the same as it was before the parsonage was built, and no other vote has been passed by the society as to the use of the parsonage.

If the parsonage and the land were exempt from taxation, judgment was to be entered for the plaintiff for \$179.49, and interest from November 1, 1887, the date of payment; otherwise, for the defendant.

A. M. Copeland, for the plaintiff.

J. B. Carroll, for the defendant.

DEVENS, J. The Pub. Sts. c. 11, § 5, cl. 3, provide that "the personal property of literary, benevolent, charitable, and scientific institutions, incorporated within this Commonwealth, and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated," shall be exempt from taxation. The seventh clause exempts from taxation "houses of religious worship owned by a religious society, or held in trust for the use of religious organizations, and the pews and furniture (except for parochial purposes); but portions of such houses appropriated for purposes other than religious worship shall be taxed at the value thereof to the owners of the houses." It will be observed, that religious societies are not included in the enumeration of the third clause, and that the exemption of their property from taxation is found in the seventh clause, exempting houses of religious worship, and recognizing that any portions of such houses as are appropriated to other than religious worship are to continue subject to taxation.

It is a familiar principle, that no exemption from taxation can be allowed except upon its being fairly shown that it was intended by the terms of the statute, and it is impossible to extend by construction the operation of the third clause above cited to religious societies. Those cases in which it has been held that

the occupation not under lease, but permissively, by officers of literary, educational, charitable, and scientific institutions, of dwelling-houses on their premises, did not render such buildings taxable, even if the advantage of such occupation was considered in determining the amount of their compensation, have no application to the case at bar. *Pierce v. Cambridge*, 2 Cush. 611. *Massachusetts General Hospital v. Somerville*, 101 Mass. 319. *Boston Society of Redemptorist Fathers v. Boston*, 129 Mass. 178.

That it would aid in the support of public worship, if the clergyman or other religious instructor could be provided with a dwelling for his occupation is true, but the Legislature has not undertaken to exempt that which would do this, but the house of religious worship only. Undoubtedly within this exemption would be included, not merely the building itself, but a reasonably sufficient territory around it for convenient ingress and egress, light, air, or appropriate and decent ornament. But when any portion of the land about the edifice is devoted to the erection of a dwelling-house, as this is a secular purpose, it is shown that so much at least of the territory is not appropriated as a part of the house of religious worship, or as necessarily incident thereto. Funds for the support of the ministry, held by a religious society, are taxable, whether invested in real or personal estate. Section 22 of c. 11 of the Public Statutes recognizes this, and provides for the mode of taxation, and it has been held that a corporation established for the purpose of holding a ministerial fund was not a charitable institution under our statute. *Greene Foundation v. Boston*, 12 Cush. 54, 58, 59.

It would hardly be contended that a house owned by the society, but situated elsewhere in the city of Springfield than upon the ground which has formed a part of that surrounding the church, would be exempt from taxation, yet such a dwelling for the use of the clergyman would contribute in equal degree to the support of religious worship. The Legislature intended to limit the exemption to the houses of religious worship alone, or to the portions of an edifice appropriated therefor, and their pews and furniture, although it is seen by the exception which is found in the seventh clause that these latter are left to be taxed for parochial purposes.

The conclusion which we reach, that the parsonage belonging to the plaintiff is taxable, is sustained by the opinion of other courts under statutes similar to our own. Thus, in New Jersey, under a statute exempting "buildings erected and used for religious worship, and the land whereon the same are situate," etc., it has been held that a house for the rector, whether on the land originally occupied only by the church edifice or elsewhere, was not exempt. *Rev. Sts. of N. J.*, p. 1152, § 64, cl. 2. *State v. Lyon*, 8 Vroom, 360. *State v. Krollman*, 9 Vroom, 323 and 574. *State v. Axtell*, 12 Vroom, 117. The same result has been reached also in Minnesota, where the words of the exemption clause are "all houses used exclusively for public worship." *St. Peter's Church v. County Commissioners*, 12 Minn. 395. *Hennepin v. Grace*, 27 Minn. 503. See also *Saint Joseph's Church v. Providence*, 12 R. I. 19; *Gerke v. Purcell*, 25 Ohio St. 229, 248.

Judgment for the defendant.

COMMONWEALTH vs. AARON G. LORD.

Worcester. October 1, 1888. — October 13, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Vagrant — Complaint — Time — Surplusage.

A complaint for vagrancy, under the Pub. Sts. c. 207, § 42, is supported by proof that the offence was committed during a substantial part of the time covered by the complaint; and an averment that such offence was committed "continually" may be rejected as surplusage.

COMPLAINT, under the Pub. Sts. c. 207, § 42, to the Central District Court of Worcester, alleging that the defendant, on January 1, 1886, "and from thence continually to the sixth day of June in the year eighteen hundred and eighty-seven, was an idle person, then and there having no visible means of support, and living without lawful employment."

At the trial in the Superior Court, on appeal, before *Brigham*, C. J., the defendant asked the judge to instruct the jury:

"1. The government must prove either that the defendant was guilty of the charge laid in the complaint on January 1, 1886; or that 'continually,' that is, all the time, from that date to June 6, 1887, he was guilty of the charge laid in the complaint; and if the jury are satisfied that the defendant has not been proved guilty of the charge laid in the complaint on January 1, 1886, and has not been proved guilty of the charge laid in the complaint all the time from January 1, 1886, to June 7, 1887, it is their duty to acquit the defendant. 2. The jury have no right to reject the word 'continually' as surplusage or unnecessary."

The judge refused so to instruct, and instructed the jury that it would be sufficient to convict the defendant if the jury were satisfied that the defendant was guilty of the charge laid in the complaint some substantial portion of the time mentioned in the complaint; that it would not be necessary to prove that the defendant was guilty of the charge of vagrancy on January 1, 1886; and that it would not be necessary to prove that he was guilty of vagrancy continually, that is, all the time, from January 1, 1886, to June 6, 1887.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. E. Sullivan, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

BY THE COURT. It was sufficient to prove that the offence charged was committed during a substantial part of the time named in the complaint. *Commonwealth v. Kerrisey*, 141 Mass. 110. The use of the word "continually" was unnecessary. It does not change or affect the identity of the offence charged, and it may be disregarded as surplusage.

Exceptions overruled.

COMMONWEALTH vs. JAMES McHUGH.

Worcester. October 1, 1888. — October 13, 1888.

Present : MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Sale of Intoxicating Liquors — Evidence — Res Gestæ.

At the trial of a complaint for unlawfully keeping for sale intoxicating liquors, there was evidence that an officer entered the defendant's kitchen and there saw upon the table a bottle which appeared to contain whiskey, and a tumbler, whereupon a third person, in the presence of the defendant and without any objection on his part, threw the bottle out of the window. *Held*, that the evidence was admissible.

COMPLAINT to the Central District Court of Worcester, alleging that the defendant unlawfully did keep for sale intoxicating liquors.

At the trial in the Superior Court, on appeal, before *Blodgett*, J., evidence was introduced, against the objection of the defendant, that, as officers entered the kitchen of the defendant, one Comfort, who was present, took a bottle, which seemed to have whiskey in it, from a table, upon which there was also a tumbler, and threw the bottle out of the window, the defendant then saying and doing nothing. The defendant contended that the evidence was inadmissible, unless the government should first connect Comfort with the defendant, by showing that there was between them some relationship, as of master and servant, or that the defendant approved, ratified, or authorized the act of Comfort. The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. E. Sullivan, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

BY THE COURT. The fact that the officers, upon entering the defendant's kitchen, saw upon the table a bottle which appeared to contain whiskey, and a tumbler, was clearly competent. It was also competent to show what became of it, as a part of the *res gestæ*, and to account for not producing it in court. Besides, the fact that the defendant permitted a person present to throw it out of the window, without any objection, is a significant indication that he did not have the bottle of whiskey for any innocent purpose. *Exceptions overruled.*

JOHN D. PENDERGAST *vs.* INHABITANTS OF CLINTON.

Worcester. October 1, 1888. — October 13, 1888.

Present : MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Personal Injuries — Highway Defect — Notice of Time, Place, and Cause.

A notice to a town that a person has been injured on a day named, while driving down U. Street, by the wheel of his carriage striking "a barrel placed in a hole in the highway, a little below the house occupied by E. R. as a boarding-house, and nearly opposite a maple tree standing on the northerly side of said street," sufficiently designates the time, place, and cause of the injury, under the Pub. Sts. c. 52, § 19; and instructions given to a jury upon the assumption that such notice was defective are immaterial.

TORT for personal injuries occasioned to the plaintiff by an alleged defect in Union Street in the defendant town.

At the trial in the Superior Court, before *Mason, J.*, it was admitted that the following notice was duly served: "To the inhabitants of the town of Clinton: You are hereby notified that on the 20th day of July, 1884, while driving down Union Street in Clinton, the wheel of the carriage in which I was riding struck a barrel placed in a hole in the highway, a little below the house occupied by Eri Richardson as a boarding-house, and nearly opposite a maple tree standing on the northerly side of said street, and in consequence I was thrown from the carriage and greatly injured. I claim of the town compensation for the injury received. John Pendergast, by his attorney, Charles G. Stevens. Clinton, July 24, 1884."

At the close of the evidence, the defendant asked the judge to rule "that there was no sufficient notice of the time, place, and cause of the plaintiff's injury." The judge declined so to rule, and, without expressly ruling that the written notice was defective, as both parties had assumed it to be so, instructed the jury that, to enable the plaintiff to recover, they must be satisfied, by fair preponderance of the evidence, that he did not intend to mislead by his notice, and that the defendant town was not in fact misled thereby, and that if the plaintiff had proved that he did not intend to mislead by said notice, and

that said notice did not in fact mislead the defendant town, there was sufficient notice.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. W. Corcoran, for the defendant.

J. R. Thayer & A. P. Rugg, for the plaintiff.

BY THE COURT. The notice given to the town was sufficient to satisfy the requirements of the statute. It was given within thirty days after the injury, and sets out "the time, place, and cause of the said injury," with reasonable certainty. Pub. Sta. c. 52, § 19. *Savory v. Haverhill*, 132 Mass. 324. As the notice was sufficient, the instructions given to the jury upon the assumption that it was defective are immaterial. We need not, therefore, discuss them, but we do not intend to imply that there was any error in them.

The other exception taken at the trial is waived.

Exceptions overruled.

CHATHAM FURNACE COMPANY vs. LAWRENCE MOFFATT.

Berkshire. September 11, 1888. — October 17, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Fraudulent Misrepresentations — Jury-waived Case — Damages —
Exceptions.*

The lessee of a mine, to induce another to purchase the lease, represented, as of his own knowledge, that there was a large quantity of ore in the mine ready to be taken out, and exhibited to him a plan of a survey of the mine, which showed that the ore was within the boundaries of the leased land. In making the plan, the surveyor, with the lessee's knowledge and assent, did not take the course of the first line leading from the shaft, through which the mine was entered, but erroneously assumed it to be due north, and the lessee never had it verified. In consequence of this erroneous assumption, the survey was misleading, the ore being in fact outside of such boundaries and the mine in the leased land being worked out. *Held*, that the lessee might be found liable for fraudulent misrepresentation, although he believed his statement to be true.

No exception lies to the refusal by a judge, who tries a case without a jury, to state all the considerations entering into his assessment of damages, no request for rulings upon the subject being made.

TORT for false and fraudulent representations made by the defendant, whereby the plaintiff was induced to take a lease of a mine, and to purchase certain mining machinery.

Trial in the Superior Court, without a jury, before *Barker, J.*, who refused to give certain rulings requested by the defendant, and found for the plaintiff, assessing his damages at a certain sum for the depreciation in value of the lease, because of such representations. The defendant subsequently requested the judge to state specifically the facts considered by him in estimating such depreciation, but at the trial did not request any rulings on the subject; and the judge declined to make such a statement. The defendant alleged exceptions, the substance of which appears in the opinion.

M. Wilcox & E. M. Wood, for the defendant.

H. L. Dawes & T. P. Pingree, for the plaintiff.

C. ALLEN, J. It is well settled in this Commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this Commonwealth, and rests alike on sound policy and on sound legal principles. *Cole v. Cassidy*, 138 Mass. 437. *Savage v. Stevens*, 126 Mass. 207. *Tucker v. White*, 125 Mass. 344. *Litchfield v. Hutchinson*, 117 Mass. 195. *Milliken v. Thorndike*, 103 Mass. 382. *Fisher v. Mellen*, 103 Mass. 503. *Stone v. Denny*, 4 Met. 151. *Page v. Bent*, 2 Met. 371. *Hazard v. Irwin*, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, amongst others. *Cooper v. Schlesinger*, 111 U. S. 148. *Bower v. Fenn*, 90 Penn. St. 359. *Brownlie v. Campbell*, 5 App. Cas. 925, 953, by Lord Blackburn. *Reese River*

Mining Co. v. Smith, L. R. 4 H. L. 64, 79, 80, by Lord Cairns. *Slim v. Croucher*, 1 DeG. F. & J. 518, by Lord Campbell. See also *Peek v. Derry*, 59 L. T. (N. S.) 78, which has been published since this decision was announced.

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and débris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from 8,000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out and visible when the bed was free from water and débris. The material point was, whether this mass of iron ore, which did in truth exist under ground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was, that this was in his ore bed; and the representations were not in fact true in this, that while in a mine connecting with the defendant's shafts there was ore sufficient in quantity and location relative to drifts to satisfy these representations, if it had been in the land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine; and the defendant's mine was in fact worked out.

During the negotiations, the defendant exhibited to the plaintiff a plan of a survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line

upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

The case of *Milliken v. Thorndike*, 103 Mass. 382, bears a considerable resemblance to the present in its facts. That was an action by a lessor to recover rent of a store, which proved unsafe, certain of the walls having settled or fallen in shortly after the execution of the lease. The lessor exhibited plans, and, in reply to a question if the drains were where they were to be according to the plans, said that the store was built according to the plans in every particular; but this appeared by the verdict of the jury to be erroneous. The court said, by Mr. Justice Colt, that the representation "was of a fact, the existence of which was not open and visible, of which the plaintiff [the lessor] had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury."

In respect to the rule of damages, the defendant does not in argument contend that the general rule adopted by the judge was incorrect, but that it does not sufficiently appear what considerations entered into his estimate. No requests for rulings upon this subject were made, and there was no error in the course pursued by the judge.

Exceptions overruled.

GEORGE L. RICE & another vs. CHARLES A. HOWLAND.

Berkshire. September 11, 1888. — October 17, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Promissory Note — Consideration — Payment — Statute of Limitations — Evidence.

In an action by the payee upon a promissory note, evidence was offered that the payee had within six years made a payment of money to the maker, to be applied in reduction of other notes due before that time and payable from the payee to the maker, whereupon the latter made the note in suit for a sum equal to such payment. *Held*, that the evidence was competent as showing that the note was without consideration, and that the statute of limitations was no bar to a recovery in set-off upon the notes due from the payee.

CONTRACT on a promissory note, dated January 5, 1880, made by the defendant to Benjamin F. Robinson, the plaintiffs' testator. Writ dated December 15, 1885. The defendant filed a declaration in set-off, for a balance due from the plaintiffs upon certain notes made by the testator to him. The answer to the declaration in set-off, among other things, averred payment, and set up the statute of limitations.

The case was submitted to the Superior Court, and, after judgment for the defendant for such balance, to this court, on appeal, upon an auditor's report as an agreed statement of facts, which, so far as material, was as follows.

At the hearing before the auditor, evidence was admitted, against the plaintiffs' objection, tending to show that Robinson made to the defendant three several promissory notes for borrowed money, all of which became due and payable to the defendant more than six years before the date of the writ; that at various times, some of which were within six years of the date of the writ, Robinson made payments of money to the defendant, and the defendant, instead of indorsing them upon the notes due him, gave, at the time of some of these payments, promissory notes to the testator equal in amount to the payments then made by him; that the note upon which the action was brought was a note so given by the defendant; that the defendant gave these notes with the understanding that the sums

represented by them should be applied in payment of the testator's notes to him as if indorsed upon them, and that some time they would come together and make the application. The auditor found that the sums paid by Robinson to the defendant, including those represented by the several notes from the defendant to Robinson, were, by the mutual understanding and agreement of the parties, intended as payments to be applied upon the three notes given by Robinson to the defendant, and stated an account which disclosed the balance due the defendant claimed by him.

M. E. Couch, for the plaintiffs.

H. L. Dawes & A. W. Preston, for the defendant.

W. ALLEN, J. The note on which the action is brought was without consideration. The defendant held several notes against the plaintiffs' testator, which were due and payable; the testator paid money to the defendant, and the defendant gave the note in suit. Whether the payments were made upon the notes was a question of fact, which concerned the consideration of the defendant's note, and upon which the fact that he gave the note was not conclusive. If the payment was made by the plaintiffs' testator to extinguish indebtedness from him to the defendant, and not to create indebtedness from the defendant to him, it was not made in consideration of the defendant's promise to pay him, and the promise was without consideration. The agreed statement shows that the auditor found that the money was paid upon the notes, and that the promise of the defendant contained in the note, which he gave as a voucher or memorandum of the payment, was without consideration. *Sargent v. Southgate*, 5 Pick. 312. *Braynard v. Fisher*, 6 Pick. 355. *Smith v. Bartholomew*, 1 Met. 276, 278. 1 Chit. Con. (11th Am. ed.) 61. Hare, Con. 216.

The payments made upon the notes declared on in set-off took them out of the operation of the statute of limitations, and the defendant is entitled to recover the balance due upon the notes to him.

Judgment for the defendant affirmed.

MARY I. ALDRICH vs. JOHN PARNELL.

Hampshire. September 18, 1888. — October 17, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Sale of Intoxicating Liquors — Civil Damages for Intoxication — Release to one of several Joint Tortfeasors.

A release to one of several persons, who all contribute to cause the intoxication of another person, whereby a right of action accrues under the Pub. Sts. c. 100, § 21, to recover the amount of damages sustained in consequence thereof, discharges all of them.

TORT, under the Pub. Sts. c. 100, § 21, to recover damages sustained in consequence of the intoxication of the plaintiff's husband, caused by the sale of intoxicating liquors to him by the defendant. Trial in the Superior Court, before *Brigham*, C. J., who, after a verdict for the plaintiff, allowed a bill of exceptions, the material part of which appears in the opinion.

D. W. Bond, for the defendant.

H. P. Field, for the plaintiff.

C. ALLEN, J. It is a familiar rule, that ordinarily a release of one of several joint tortfeasors discharges all; and this rule is applicable, even though there was no concert of action among them, provided the injury was single. *Stone v. Dickinson*, 5 Allen, 29. *Brown v. Cambridge*, 3 Allen, 474. *Goss v. Ellison*, 136 Mass. 503. It has also been determined that this rule applies if a release is given to one against whom a claim is made, although he may not in fact be liable. *Leddy v. Barney*, 139 Mass. 394.

The only question in the present case is whether this rule is applicable to a claim arising under the Pub. Sts. c. 100, § 21; and we are of opinion that it is. By the provisions of that section the plaintiff had a right of action severally or jointly against all persons who, by selling or giving intoxicating liquor to her husband, had caused in whole or in part his intoxication, habitual or otherwise. The declaration contained two counts, the first of which charged sales extending over a period of time, and general injury to the plaintiff arising from her husband's

acquiring confirmed habits of intoxication; and the second count charged that the defendant sold and delivered intoxicating liquor to her husband on the 26th of September, 1883, whereby he became intoxicated and met with an injury. The plaintiff, in support of her action, relied on evidence tending to show that her husband, from the 30th of April to the 26th of September, 1883, often became intoxicated from drinking liquor obtained at the defendant's saloon, and at other places; and that in the afternoon of said 26th of September he drank liquor once at one Gabb's saloon, once at the Mansion House in Northampton, and afterwards seven times at the defendant's saloon, and became intoxicated, and met with an injury in consequence of such intoxication. In assessing damages no distinction was made between the two counts, and a general verdict was returned, which may have been applicable solely to either count or in part to each. The plaintiff, after bringing this suit, made a demand upon Gabb, and also upon the proprietor of the Mansion House, for damages sustained by reason of the intoxicating liquor sold to her husband by each of them on said 26th of September, and also for selling liquor to him prior to that time. The instructions to the jury assumed that the defendant and Gabb and the proprietor of the Mansion House might all have contributed to the intoxication for which damages might be assessed; and it was ruled that a settlement with one of them would not operate as a release to this defendant, nor bar the present action.

The effect of this ruling would be to allow the plaintiff to recover from the various persons contributing to her husband's intoxication more than the amount of the injury sustained by her. If there were a dozen such persons, she might get what she could by successive settlements with eleven of them, and then recover from the twelfth as much as if she had received nothing from the others. She might recover from each one in succession the full amount of the damages sustained by her. We do not think the statute admits of this construction. It allows her to sue them all, jointly or severally, and in either case the measure of damages would be the same. The statute makes no apportionment. Each would be liable to pay to her the full amount of damages which she had sustained. *Bryant v. Tidgewell*, 138 Mass. 86. If she were to recover a joint judg-

ment against several, a payment of the judgment by one of them would discharge it as against all. If she elects to bring several actions, and recovers several judgments, she may indeed gain an advantage by being enabled to collect that judgment which is for the largest amount, but a satisfaction of any one of the judgments would operate as a satisfaction of all, except the costs, and bar any other action for the same cause. In other words, she can have but a single satisfaction.

By giving her a right to bring several actions, the statute does not have the effect to give her a right to multiply her damages. When she has received satisfaction for the damages sustained by her, her right of recovery is gone. The effect of the statute is to put all who contributed to her husband's intoxication in the position of joint tortfeasors or trespassers. The principle of the statute is, that one suffering injury by reason of the intoxication of another, who stands within the enumerated kinds of relationship, shall have a remedy, either jointly or severally, against those who caused or contributed to the intoxication, to recover the amount of damages sustained. The statute is a departure from the common law, and gives a remedy which did not exist before. It would require plain words to show that it was intended to allow the recovery of more than the damages actually sustained. We cannot think that the Legislature meant to give to a person so injured a right to recover such damages, multiplied by the number of those who contributed to the intoxication.

The plaintiff relies especially upon the decision in *Jewett v. Wanshura*, 43 Iowa, 574, as holding that, under a similar statute, a settlement with one of those who contributed to the intoxication is not a bar to an action against others. But the statute in Iowa gave no joint right of action, and the court held that under the circumstances of that case no joint action would lie, because the sales by the several parties were on separate days, and that each seller was only liable for the injury produced by his own acts. The case of *Kearney v. Fitzgerald*, 43 Iowa, 580, which was not cited by the plaintiff, is in accord with our present decision.

Exceptions sustained.

CHARLES H. TORREY vs. BOSTON AND ALBANY RAILROAD
COMPANY.

Hampden. September 25, 1888. — October 17, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Personal Injuries — Railroad — Passenger on Platform.

In an action by a passenger against a railroad company, to recover for personal injuries, an instruction to the jury that, if the plaintiff, knowing that the train was about to start, was unnecessarily or improperly on the platform of a car, and was thrown off and injured by the starting of the engine with no unusual or unnecessary jerk, he could not recover, is sufficiently favorable to the plaintiff.

TORT for personal injuries sustained by the plaintiff, a passenger on the defendant's cars. Trial before *Brigham*, C. J., who allowed a bill of exceptions, which, so far as material, was as follows.

The plaintiff testified, that on March 27, 1887, at about a quarter past ten in the evening, he came to the Boston and Albany Railroad station in Westfield, to accompany, for a portion of her journey, a relative, who was to leave for her home in Ohio on a train due to arrive from the East at about that hour. He bought a ticket, boarded the train, and took a seat. Afterwards, and before the train started, he stepped to the platform of the car to see if there was any one on the platform by whom he could send word to his family that he would not reach home until late. He looked in either direction and saw no one, and, as he was still looking, the train started with a jerk. He reached out his hand to save himself, and caught hold of the gate at the side of the platform, which, being open, swung to as he grasped it, and he was thrown off the platform and under the car, receiving the injuries alleged.

At the end of the charge to the jury, the plaintiff alleged an exception to the entire charge. The jury then retired, and, after deliberation, returned into court and asked to be instructed as to the liability of the defendant provided the plaintiff was on the platform when the train was about to start. The judge thereupon further instructed the jury in substance as follows. If the

plaintiff was necessarily and properly upon the platform, the fact that he was there would not prevent his recovering; but if he was not necessarily and properly there, then the fact that the starting of the engine caused him to fall would not render the defendant liable, unless the jerk of the engine was unusual, extraordinary, and unnecessary. If the plaintiff was not necessarily and properly upon the platform, knowing that the train was about to start, and the train started in no extraordinary way, he cannot recover. A man is not in the exercise of good care if he is in such a place, unless he is driven by some necessity, or has an occasion there which is to some extent compulsory.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

H. W. Ely, for the plaintiff.

Samuel Hoar, (*G. M. Stearns* with him,) for the defendant.

W. ALLEN, J. The only exception properly taken, and the only one which has been argued, is to the instructions given in reference to the plaintiff's testimony that he was thrown down by the starting of the train when he was upon the platform of the car. The instruction was, in substance, that if he was unnecessarily or improperly there, knowing that the train was about to start, and was thrown down by the starting of the engine, with no unusual or unnecessary jerk, he could not recover. The instruction was sufficiently favorable to the plaintiff. *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429. *Gavett v. Manchester & Lawrence Railroad*, 16 Gray, 501. *Todd v. Old Colony & Fall River Railroad*, 3 Allen, 18, and 7 Allen, 207. *Lucas v. New Bedford & Taunton Railroad*, 6 Gray, 64. *Gahagan v. Boston & Lowell Railroad*, 1 Allen, 187. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137. *Bates v. Old Colony Railroad*, 147 Mass. 255.

It is argued that the plaintiff left his seat in the car and went upon the platform when the car was at rest; but this is immaterial, if, knowing that the train was about to start, he was voluntarily and of his own choice there when the car was in motion. The plaintiff's testimony showed that he voluntarily and for his own convenience took an exposed position, not intended for passengers, and he cannot hold the defendant liable for injuries to

which his act contributed. The court might have instructed the jury that the reason given by the plaintiff for going to and remaining upon the platform was not sufficient to show the necessity or propriety of the act, and no harm was done to the plaintiff by leaving that question to the jury under the instructions given.

Exceptions overruled.

COMMONWEALTH vs. JOSEPH BRIGHAM.

Worcester. October 1, 1888. — October 17, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Adultery — Evidence — Attempt to escape Arrest — Misnomer.

Evidence of an attempt to avoid or escape arrest is admissible on the question of the guilt of a defendant in a criminal case, the time, place, or other circumstances of its occurrence affecting its weight only.

On an indictment for adultery evidence was admitted that a woman, described therein as Albino Jefferds, the person with whom the offence was alleged to have been committed, had pleaded "not guilty" to a complaint against Albino Jeffards. *Held*, that the evidence was rightly admitted on the question whether she was correctly described.

INDICTMENT for adultery with one Albino Jefferds in August, 1887.

At the trial, before *Blodgett, J.*, after the introduction of evidence tending to prove the commission of the offence, evidence was also introduced that the defendant was held to answer for the offence alleged, in August, 1887, in the Central District Court of Worcester, and that the defendant recognized, as ordered by that court, for his appearance to answer before the Superior Court; that at the October sitting of the Superior Court, in the same year, the defendant was indicted for the alleged offence, and his case was continued; that at the January sitting in 1888 of the Superior Court, another indictment in different form, for the same offence, was found against the defendant; and that a *capias* was issued upon the second indictment for the arrest of the defendant, who was at large upon bail.

The government was permitted to introduce in evidence, against

the objection of the defendant, the testimony of the police officers who arrested the defendant, that on January 16, 1888, about eleven o'clock in the forenoon, they went with the capias to the shop where the defendant was employed, and called the defendant into the office; that they told him that they had a warrant for his arrest, and that he must go at once with them; that the defendant asked to be allowed to go into the wash-room to clean up, and was allowed to do so; that the defendant did not return, but left the building without hat or overcoat, and ran away; that about an hour and a half afterwards they saw him on the street with his hat and overcoat on, and talking with the person described as Albino Jefferds; and that upon seeing them he again ran away, whereupon they followed and arrested him.

The defendant introduced evidence tending to show that the true name of the person described in the indictment as Albino Jefferds was Albina Gervais, and that she was never called or known as Albino Jefferds, and was never known or called otherwise than as Albina Gervais. The government was permitted to introduce in evidence, against the objection of the defendant, that the person described as Albino Jefferds had pleaded "not guilty" to a complaint issued from the Central District Court of Worcester, in August, 1887, against Albino Jeffards, for fornication with Joseph Brigham. Upon the question whether the name of the woman with whom the adultery was alleged to have been committed was stated correctly in the indictment, there was additional evidence, and upon this branch of the case the judge gave full instructions, to which no exception was taken.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. R. Johnson, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

DEVENS, J. The fact that a person has endeavored to avoid arrest, or to escape therefrom, is to be considered by the jury as bearing upon the question of his guilt, and is of greater or less weight as the time when, or the circumstances under which it takes place, may reveal, or fail to do so, an intention to evade justice. Best on Presumptions, § 248. In the case at bar, it would be for the jury to say whether the defendant was not acquainted with the charge made against him when he was

arrested upon the *capias* issued by the court, especially in view of the fact that he had recognized to appear before the court to answer for the same offence, and that a previous indictment, although in a different form, had been found against him, and this even if it did not distinctly appear that the officers at the time informed him of the nature of the indictment. Nor was it without relevancy that the defendant was found an hour or two after his escape in the company of the person with whom the offence charged was alleged to have been committed, and that he then again ran away.

In determining whether this latter person was rightly named in the indictment, it was competent to show to what name she had answered, and how she had permitted herself to be called. It was, therefore, competent to show that she herself had pleaded to a complaint in the District Court in which she had been described by the same name as that given to her in the indictment. Even if she might, if so disposed, have pleaded to a complaint in which her name was incorrectly stated, and thus simply have waived a misnomer, this consideration went to the weight of the evidence only. When one answers to a name, it is certainly evidence that such is either his true name or one by which he consents to be known, although it is possible that he may do so merely because he considers the matter unimportant, and explanation therefore unnecessary. Nor is it of consequence that the name in the complaint was spelled Jeffards, while in the indictment it was spelled Jefferds. These names apparently are *idem sonans*; certainly they might have been found so to be by the jury. *Commonwealth v. Donovan*, 13 Allen, 571. *Commonwealth v. Warren*, 143 Mass. 568. Upon this question there was also additional evidence, and as upon this branch of the case the court gave full instructions, which were not excepted to, there can be no reason to think that the defendant has suffered any injustice.

Exceptions overruled.

ARTHUR WITHERELL vs. ROSANNA MURPHY.

Berkshire. September 11, 1888. — October 18, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Sale by Broker — Commissions — Repudiation of Sale by Principal.

A written agreement between the owner of real estate and a broker contained an authority to sell it "for fifteen thousand dollars, about one half cash." *Held*, that the broker was authorized to sell it "for fifteen thousand dollars cash on delivery of the deed."

The agreement further stipulated that the owner might withdraw the property from sale by giving thirty days' notice in writing to the broker, and by paying the agreed commissions if the property was sold within thirty days after such withdrawal. *Held*, that the owner could not, by revoking the broker's authority after a sale by him in accordance therewith, deprive him of his commissions.

CONTRACT for commissions and services in the sale of real estate for the defendant. The first count of the declaration was upon the following agreement signed by the defendant: "North Adams, Mass., January 27th, 1886. I, Rosanna Murphy, of North Adams, hereby authorize and empower A. J. Witherell to sell the following described real estate, viz.: my hotel property on State Street, on the following terms; for \$15,000, about one half cash, the deed to be a good and sufficient warranty deed, duly executed, and accompanied with a search made by — —, and I further authorize him, the said A. J. Witherell, to contract in writing in my behalf for the sale of said premises, pursuant to the terms of sale and provisions herein contained; and in consideration of the agreements on the part of said A. J. Witherell to be performed, I agree to pay him, when the property is sold, the sum of two per cent on amount of sale, and in consideration of the premises the said A. J. Witherell agrees to use his best endeavors to find a purchaser for said property. It is mutually agreed that the said Murphy may withdraw said property from sale by giving said A. J. Witherell thirty days' notice thereof in writing, and paying the above mentioned sum of two per cent, if said property is sold within thirty days after such withdrawal." The second count was upon an account annexed for such commissions and services.

At the trial in the Superior Court, before *Thompson, J.*, the plaintiff, a real estate broker, testified that, acting under the above agreement, he made a contract with one Elizabeth Gorry, on March 24, 1887, to sell to her the premises in question for the sum of \$15,000 in cash, payable on delivery of the deed, such agreement to be put in writing; that on March 26, 1887, he went to the defendant's house and informed her that he had found a purchaser, who would pay \$15,000 for the property, whereupon the defendant told him that she would not sell the premises for that sum, but would sell them for \$16,000; that he then went to Mrs. Gorry and told her of his interview with the defendant, and she then offered \$16,000 for the premises, provided she could have the deed immediately; that he at once informed the defendant of this offer, and the defendant then refused to sell for less than \$20,000; that he then told Mrs. Gorry of the defendant's refusal, and at her request, on March 28, 1887, for the first time reduced to writing the contract of sale of March 24, 1887, which recited that the sale was to Mrs. Gorry "for the sum of fifteen thousand dollars cash on delivery of deed"; that afterwards a demand was made upon the defendant that she should execute and deliver a deed of the premises to Mrs. Gorry, who offered to pay to the defendant \$15,000 in cash upon the delivery of the deed; that the defendant refused to deliver any deed of the premises, but made no objection that the offer was to pay entirely in cash; and that on March 28, 1887, he received from the defendant a notice purporting to revoke his authority to sell the premises in question.

The defendant asked the judge to rule that the action could not be maintained, because the alleged contract of sale between the plaintiff and Mrs. Gorry, in that it was an agreement for a sale for an entire sum in cash, was not in accord with the terms of the plaintiff's authority, which was only for a sale for a sum to be paid "about one half cash." The judge declined so to rule, and instructed the jury that the alleged contract of sale with Mrs. Gorry, if made in good faith, was a substantial compliance with the terms of the plaintiff's authority; and that if it appeared that no objection was made by the defendant, at the time she was notified of the sale and a deed was demanded, as to the mode of payment stipulated for in the contract

of sale to Mrs. Gorry, this fact was evidence for the jury to consider.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

H. C. Joyner, for the defendant.

A. J. Wuterman, (*A. Potter* with him,) for the plaintiff.

KNOWLTON, J. The defendant contends that the sale of the real estate by the plaintiff for "\$15,000 cash on delivery of the deed," was not in accordance with the terms of the written contract which authorized him to make a sale "for \$15,000, about one half cash."

The contract was silent as to a sale for any larger sum, and also as to receiving more than one half of the price in cash, and as to the form in which that part of the price which was not required to be cash should be paid. It can hardly be contended that the sum named was a limitation of the plaintiff's right to sell for a larger price if he had an opportunity to do so, and we are of opinion that the authorization to sell for about one half cash was as to the remainder merely a permissive stipulation for the benefit of the purchaser and of the plaintiff. In determining what kind of payment would answer the requirement of the contract in regard to that part of the consideration which was not called for in cash, the parties would naturally have inquired whether the method proposed would enable the defendant speedily to obtain the amount in money, or would be safe security for the ultimate payment of it in money with interest. They could have found no higher standard than cash by which to test the payment proposed. Certainly no higher standard was established by the written contract. We must, therefore, hold that the plaintiff was authorized to sell the defendant's property for a price to be wholly paid in cash on the delivery of the deed.

The only other ground of defence grows out of the defendant's refusal to perform the contract which she had authorized the plaintiff to make in her behalf. The declaration contains two counts, one upon an account annexed for commissions and services, and the other setting out the written contract, and what was done under it, and the defendant's refusal to perform it. No question of pleading was raised at the trial, and none is open

upon these exceptions. And we have no occasion to inquire whether Elizabeth Gorry, the purchaser, acquired rights against the defendant.

The plaintiff made a bargain of sale of the real estate which he was authorized to make, and which the purchaser was ready to carry out. The defendant was informed of it before it was put in writing, and declined to be bound by it. She named a higher price at which she said she would sell, and when the plaintiff obtained an acceptance of her offer, on condition that she should make the deed at once, she again declined to sell, unless she could get a much larger sum. He then put in writing and delivered to the purchaser his original contract of sale, and the purchaser accepted it, and was ready to perform her part of it. Under these circumstances, we think he was entitled to the sum named in the contract as the commission to be paid for making a sale. It was plainly implied in the contract, that, after the plaintiff had made an agreement for a sale which needed only the defendant's execution of a deed to consummate it, the defendant should not intentionally defeat the sale, and thus deprive the plaintiff of his commission. It was expressly provided that the defendant might withdraw the property from sale by giving the plaintiff thirty days' notice thereof in writing, and paying the commission if the property was sold within thirty days after the withdrawal. This was equivalent to a stipulation that it should not be withdrawn otherwise. See *Cook v. Fiske*, 12 Gray, 491; *Prickett v. Badger*, 1 C. B. (N. S.) 296.

It is immaterial in this case whether the plaintiff's recovery properly rests on a right to receive his commissions for a sale within the meaning of the contract, or upon a claim for an equivalent sum as damages for the defendant's refusal to perform her contract.

Exceptions overruled.

MERRITT I. WHEELER vs. MARK LAIRD.

Berkshire. September 11, 1888. — October 18, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Parol Gift of Land — Adverse Possession — Evidence.

At the trial of a writ of entry, there was evidence of a parol gift of the demanded premises to the tenant; that he thereupon took possession of them and occupied them exclusively for twenty years; that during that time he claimed them as his own, the donor making no claim for rent or otherwise; that the tenant moved and repaired buildings, put a lightning-rod on the house, and rebuilt fences; that he set out fruit trees and employed men for nearly two years in cutting off bushes; that he always paid the taxes on the premises; that frequently he worked for the donor and received from him pay therefor, no portion of which was sought to be retained for the use of the premises; and that he pastured the donor's cow thereon and the donor paid him for the pasturage. *Held*, that there was evidence to warrant a finding that the tenant had acquired title by adverse possession.

WRIT OF ENTRY, dated August 5, 1887, to recover a farm in Great Barrington and Sheffield. Trial in the Superior Court, before *Staples*, J., who directed a verdict for the demandant, and allowed a bill of exceptions, the material part of which appears in the opinion.

H. C. Joyner, for the tenant.

E. M. Wood, for the demandant.

KNOWLTON, J. Both parties claim title to the demanded premises under John H. Coffing, who died on August 14, 1882. The demandant has a deed, dated May 19, 1887, duly executed by the executors of the will of Coffing under a power therein contained. The tenant claims a title by adverse possession, immediately following a parol gift of the property.

It is settled law, in this Commonwealth and elsewhere, that one who enters upon real estate by virtue of a parol gift, and, claiming as owner, continues for twenty years or more an open, exclusive, adverse, and uninterrupted possession of it, thereby acquires a perfect title. *Sumner v. Stevens*, 6 Met. 337. *Motte v. Alger*, 15 Gray, 322. *Duff v. Leary*, 146 Mass. 533. *Comins v. Comins*, 21 Conn. 413. *Pope v. Henry*, 24 Vt. 560. *International Bank v. Fife*, 95 Mo. 118. The tenant at the trial

endeavored to bring himself within this doctrine. The presiding judge ruled that there was no evidence to be submitted to the jury in support of his claim, and directed a verdict for the demandant. The only question in the case is whether this ruling was correct.

John H. Coffing acquired title to the farm which is the subject of the controversy by a deed dated March 31, 1866. Previously to that time it had been owned by the Richmond Iron Works, a corporation of which he was president. The tenant testified that, about the middle of March, 1866, Coffing told him that he had bought the farm, and was going to give it to him as a home for himself and his wife, and that he said, among other things, "It is your farm; I want you to enter the things in your name, pay all the taxes, and do as if it was your own." There was also evidence, from other witnesses, of declarations of Coffing at different times, from which the jury might have found that he made a parol gift of the farm to the tenant about March, 1866. The tenant further testified, that he took possession of it during that month, and that, as recited in the bill of exceptions, "he had occupied and claimed the premises as his own ever since; that he had moved two of the buildings, one a hog-pen which was in a dangerous condition, and repaired and shingled the buildings, and put a lightning-rod on the house, rebuilt the fences in part, . . . set out fruit trees, and employed men for nearly two years in cutting off bushes; that he had always paid taxes on said farm; that said Coffing had never, after tenant took possession, during his lifetime, claimed any rent therefor, or exercised any control, or claimed to tenant that he had any interest in the demanded premises"; also, that "after he took possession of the farm he worked for Mr. Coffing very frequently, and that Mr. Coffing always paid him for such work, and never asked him to turn any of it for the use of the farm; that at one time he pastured a cow for Coffing on the demanded premises, and Coffing paid him for the pasturage; and that the demandant also hired pasture of him on the farm and paid him."

This evidence, if believed, would have warranted a verdict for the tenant; and there was no contradiction of his statement that he was in exclusive occupation of the farm from March, 1866, until May, 1887, and that Coffing never interfered with him, and

that Coffing's legal representatives first interfered when they made their bargain with the demandant in the spring of 1887.

There was a great deal of contradiction upon the question whether the tenant occupied adversely to Coffing or in recognition of his title, and also, incidentally, upon the question whether Coffing made a parol gift to the tenant. Some testimony was given by the tenant on cross-examination which tended greatly to weaken the effect of his testimony in direct examination; but the case shows no undisputed facts, and no admissions of the tenant, which, as matter of law, control the evidence relied on by him to show his adverse possession. There was direct contradiction as to the nature of interviews between the tenant and the executors in regard to the trespass of wood-choppers upon the land, and as to the capacity in which Mr. Dewey, an attorney at law and one of the executors, acted in writing a letter to one Smith, who employed the wood-choppers, notifying him to desist; and the tenant's testimony that the letter was written by Mr. Dewey as his attorney was in part corroborated by the witness Fay. In no part of the case was there an admission by the tenant of Coffing's or the executors' rights in the premises, or any such clear and definite recognition of them, as necessarily to show that his possession was permissive, and not adverse. What was the nature of his possession was, therefore, a question of fact for the jury, upon all the evidence, and not a question of law for the court.

Exceptions sustained.

COMMONWEALTH vs. EDWARD SLATTERY.

Hampshire. September 18, 1888. — October 17, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Rape — Condonation of Offence — Verdict in Writing.

At the trial of an indictment for rape, the presiding judge refused to instruct the jury, that, if the woman after the alleged offence excused or forgave the defendant, he could not be convicted. *Held*, that the request was rightly refused.

The presiding judge instructed the jury to reduce their verdict to writing, and sign it by their foreman, and to bring it with the indictment in a sealed envelope

into court the next morning. At that time they brought in the indictment in an unsealed envelope, with a verdict of "guilty" written upon it, and presented it to the court as the verdict agreed upon and signed before the jury separated the evening before. The jury, to a question by the clerk whether the defendant was "guilty or not guilty," replied "guilty," and the verdict was affirmed, received, and recorded. *Held*, that it sufficiently appeared that the jury agreed before they separated upon the verdict which they returned.

INDICTMENT for rape on Bridget Donovan. At the trial in the Superior Court, before *Dunbar, J.*, it appeared in evidence that the defendant, as he was riding in a carriage, overtook Bridget Donovan on the street, as she was returning home from her work, and invited her to ride to her home; and that upon a pretext he drove into some woods, dragged her from the carriage, and had sexual intercourse with her. It also appeared in evidence, uncontradicted, that after the act the woman, upon being told by the defendant to enter the carriage again, did so, and rode to her house with him; that they conversed together on the way to her home; that on reaching her house he stopped the horse, alighted from the carriage, and assisted her out, and she went into her house; and that on the way from the woods to her house she made no complaint in regard to the alleged rape, but did request the defendant to marry her, and upon being met by a negative response, stated that she "would tell his folks."

The defendant asked the judge to instruct the jury, "that, if said Donovan at any time after the act excused or forgave the defendant, then she ratified the act, and he cannot be convicted in the case." The judge refused so to instruct, but instructed the jury that evidence of her acts and conversation with the defendant, both before and after the commission of the alleged offence, was a proper subject for their consideration in determining the guilt or innocence of the defendant at the time of its commission.

The judge also instructed the jury, if they agreed upon a verdict, to reduce the same to writing and sign it by their foreman, and to return the same with the indictment in a sealed envelope into the court the next morning at the reopening of the court. The jury duly retired to deliberate upon the case, and, about seven o'clock in the evening, after the adjournment of the court for the day, and under the direction of the court, separated and left the court-house. At nine o'clock the next morning the jury

reassembled and took their seats, and the clerk duly asked them if they had agreed upon a verdict. The foreman then passed an unsealed envelope to the clerk containing the indictment, upon which indictment was written the following: "Commonwealth of Massachusetts. Hampshire, ss. Superior Court, June Term, 1888. In the case of the Commonwealth against Edward Slattery on an indictment for rape, the jury say that the defendant Edward Slattery is guilty, as charged in said indictment. Wm. H. Shaw, Foreman of the Second Jury."

The foreman, in the presence of the whole jury, in reply to questions put to him by the court, against the objection of the defendant, stated that the envelope containing the indictment and verdict was not sealed before the jury separated; that the verdict had been agreed upon, written out, and signed before such separation; that it was, when signed, in the form in which it was presented in court, and had not been changed; and that it had been constantly in the custody of the foreman since the separation of the jury. The clerk then asked the jury if they had agreed upon a verdict, and the foreman replied that they had. The clerk asked, "Was the defendant guilty or not guilty?" and the jury replied, "Guilty." The verdict was affirmed in the usual manner. The court thereupon ordered that the verdict of guilty be received and recorded; to which the defendant objected, and alleged exceptions.

J. B. O'Donnell, for the defendant.

A. J. Waterman, Attorney General. & *H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

W. ALLEN, J. The court rightly refused to give the instructions requested. The injured party could not condone the crime by excusing or forgiving the criminal.

In civil cases, and in criminal cases not capital, the court can permit a jury, after they have agreed upon their verdict, to separate before rendering the verdict in court. In civil cases, the verdict being in writing, is made before the jury separate, and afterwards affirmed by them in court; in criminal cases, the verdict must be rendered orally in court, but it must appear to be the verdict which the jury had agreed upon before they separated. The usual practice is to instruct the jury to bring in a sealed verdict, which is opened and read by the clerk in

open court, after which, in civil cases, the written verdict is filed and affirmed by the jury, and in criminal cases an oral verdict is taken in the usual form. The purpose of the written statement in criminal cases is to make it plain that the verdict rendered is the one which the jury had agreed to render before they separated, and the purpose of directing it to be sealed up and delivered unopened to the court is to identify the writing. *Commonwealth v. Carrington*, 116 Mass. 37. *Commonwealth v. Tobin*, 125 Mass. 203. *Commonwealth v. Costello*, 128 Mass. 88. *Commonwealth v. Walsh*, 132 Mass. 8.

In the case at bar, the jury were instructed to reduce their verdict to writing, and to sign it by their foreman, and to bring it with the indictment in a sealed envelope into court the next morning. Instead of bringing into court a verdict on a separate piece of paper enclosed with the indictment in a sealed envelope, they brought in the indictment with the verdict written upon it in an unsealed envelope. The instruction to seal up the envelope was not a condition upon which the jury were authorized to separate, but a direction as to the manner of preserving the papers and the evidence of their doings, a literal compliance with which was not necessary to give the court jurisdiction to receive the verdict. The question was not whether the jury had in every particular precisely followed the instructions given to them, but whether the paper handed by them to the court sufficiently identified itself as the paper signed by the foreman before the jury separated. The writing upon the indictment handed in by the jury in an unsealed envelope would identify itself as surely as a writing upon a separate piece of paper in a sealed envelope. The writing was presented by the jury to the court as the verdict agreed upon and signed before the jury separated, and the fact that it was written upon the indictment was sufficient to identify it. We need not consider whether it would have been sufficient had the writing been separate from the indictment, nor whether, if insufficient, it could have been aided by verbal statements of the jurors.

Exceptions overruled.

WILLISTON SEMINARY vs. COUNTY COMMISSIONERS OF
HAMPSHIRE.

Hampshire. September 18, 1888. — October 18, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Tax — Exemption — Accumulating Fund.

An accumulating fund held in trust for the future benefit of an incorporated educational institution is, by force of the Pub. Sta. c. 11, § 5, cl. 3, exempt from taxation.

PETITION for a writ of certiorari to quash the proceedings of the county commissioners of Hampshire in refusing to abate a tax assessed upon the Williston Seminary by the town of Easthampton.

The petition alleged that the Williston Seminary was a corporation duly organized for educational purposes; that it was beneficially interested in bequests contained in the fourth and thirty-fourth clauses of the will of Samuel Williston, late of Easthampton, who died on July 18, 1874, and whose will was duly admitted to probate, which clauses were as follows:

"Fourth. I also give and bequeath to my said wife one hundred and fifty thousand dollars for her life, which sum of one hundred and fifty thousand dollars, after the decease of my said wife, I hereinafter give to Williston Seminary. . . .

"Thirty-fourth. I give and bequeath to the Williston Seminary, in Easthampton, an incorporated institution, which was originally founded and has been wholly endowed by me, the sum of two hundred and fifty thousand dollars, in manner and for the purposes following, that is to say: The sum of fifty thousand dollars is to be held in trust by my executrix and executors, the survivors or survivor of them, securely invested upon securities as good and safe as are now required by the best managed institutions for savings, until the same shall double and amount to the sum of one hundred thousand dollars, when it is to be paid over to the said Williston Seminary, making in fact my bequests to the said institution herein three hundred thousand dollars." Here followed directions to the trustees of the Semi-

nary as to the expenditure of a part of the bequest. "The remainder of said bequest to Williston Seminary, including the said sum of fifty thousand dollars, to be held in trust till it shall amount to the sum of one hundred thousand dollars as aforesaid, as also the sum of one hundred and fifty thousand dollars, hereinafter mentioned, to be held in trust until it shall amount to the sum of three hundred thousand dollars when received by the said trustees, I direct them to invest for the benefit of the said institution with special reference to the following objects." Here followed a list of the objects, and further directions to the trustees.

"I also give and bequeath to the Williston Seminary, after the decease of my said wife, the sum of one hundred and fifty thousand dollars, the life use of which is hereinbefore given to my said wife in manner following, that is to say: The said sum of one hundred and fifty thousand dollars is to be held in trust by my executors, the survivors or survivor of them, securely invested in manner last above prescribed, until the same shall double and amount to the sum of three hundred thousand dollars, when it is to be paid over to the said Williston Seminary for the objects above enumerated. . . . Provided, however, that all my bequests to Williston Seminary are subject to the payment of the following annuities from the time it shall receive the sum of two hundred and fifty thousand dollars after my decease, namely: 1. To Mrs. Mary Ann Graves, widow of Eli Graves, late of Southampton, deceased, one hundred dollars per annum. 2. To Sarah S. Richardson, of Hartford, Pa., one hundred dollars per annum. 3. To the widow of Birdseye Brooks, deceased, now supposed to be residing at New Haven or Bridgeport, Conn., fifty dollars per annum. 4. To Mrs. Dorcas Street, formerly Loomis, of Southampton, one hundred dollars annually. 5. To Mrs. Sophia Cooper, of Easthampton, fifty dollars annually. The bequests to Williston Seminary herein are chargeable with these several annuities, which are payable by the Seminary to the annuitants respectively during the life of each, one half on the first day of January, and the other half on the first day of July, in each year and every year."

The petition further alleged, that the fund of \$50,000, which was for convenience called the Williston Seminary Trust Fund, and the fund of \$150,000, which was for convenience called the

Emily G. Williston Trust Fund, had neither of them increased to double its original amount, and both were still in the hands of the surviving trustees under the will; that the town of Easthampton in 1886 assessed taxes upon these two funds to Williston Seminary; that the Williston Seminary seasonably filed a petition to the county commissioners of Hampshire for an abatement of these taxes; and that the commissioners, at a hearing before them, did, as matter of law, rule that the two trust funds were not exempt from taxation as the personal property of Williston Seminary, and that the personal property constituting each of such trust funds was not exempt under any provision of the Pub. Sts. c. 11, § 5, or under any other provision of law, and dismissed the petition.

The petition further averred, that the ruling of the commissioners was incorrect, and that the trust funds were exempt from taxation, for the reason that they were accumulating funds, made by the Pub. Sts. c. 11, § 20, cl. 6, for purposes of taxation, the personal property of the person beneficially interested in the same, the person in the present case being an educational institution whose personal property was exempted from taxation under the Pub. Sts. c. 11, § 5, cl. 3.

The respondents demurred to the plaintiff's petition, on the grounds, "1st, that the plaintiff has not stated such a case as entitles it to any relief against these respondents, or as prayed for; and, 2d, because the ruling thereby complained of and sought to have reviewed, namely, that the funds therein referred to on the facts therein set out were taxable to the petitioner, and were not exempt under the Pub. Sts. c. 11, § 5, cl. 3, is in law correct."

Hearing on the petition and demurrer before *W. Allen, J.*, who reserved the case for the consideration of the full court.

J. C. Hammond & M. F. Dickinson, Jr., (*H. R. Bailey* with them,) for the petitioner.

W. G. Bassett & D. Hill, (*J. A. Wainwright* with them,) for the respondents.

C. ALLEN, J. By the Pub. Sts. c. 11, § 20, cl. 6, "Personal property placed in the hands of a corporation or individual as an accumulating fund for the future benefit of heirs or other persons shall be assessed to such heirs or persons, if within the

Commonwealth." By the Pub. Sts. c. 3, § 3, cl. 16, in the construction of statutes the word "person" may extend and be applied to bodies politic and corporate. Under these provisions the property in question has been assessed to the Williston Seminary, that being treated as the corporation for whose future benefit the property was held as an accumulating fund. It was perhaps assumed that the property could not be assessed to the annuitants, whose annuities were made chargeable upon the bequests to the Seminary, and that it must be assessed to the Seminary if assessed at all. The amount of the annuities would be but a small proportion of the income from the fund; and other funds were also chargeable with the payment of them, and were more than sufficient for such payment, and the income from an annuity is taxable to those entitled to receive it. Pub. Sts. c. 11, § 4.

The question therefore is, whether the property held as an accumulating fund was properly assessed to the Seminary, in view of the Pub. Sts. c. 11, § 5, cl. 3, by which the personal property of literary, benevolent, charitable, and scientific institutions, incorporated within this Commonwealth, is exempted from taxation. It is contended on the part of the respondents, that this property is not yet the property of the Seminary; that the vesting of it is expressly postponed until certain conditions precedent are fulfilled; and that the possibility or probability that it will become the property of the Seminary cannot exempt it. But the statute of exemption is not limited to personal property in possession; it exempts all the personal property of such institutions, whether in possession or not. All property, real and personal, of the inhabitants of this State is taxable, except such as is expressly exempted by law; and the personal property of the enumerated institutions is expressly exempted by law. The word "property," in its ordinary legal signification, "is *nomen generalissimum*, and extends to every species of valuable right and interest." *Boston & Lowell Railroad v. Salem & Lowell Railroad*, 2 Gray, 1, 35. The right or interest which the Seminary has in this accumulating fund is properly described as its property.

An ordinary *cestui que trust* has a property in a fund held for his benefit; he has a right and interest which he may vindicate

in various ways. If trustees violate their duty, make improper investments, misuse or misappropriate the funds, the *cestuis que trust* may bring them to account, and are the proper persons to do so. But especially in the present case the property held in trust is, to all practical intents and purposes, the property of the Seminary. The legal title is in the trustees, but the whole beneficial interest — unless, indeed, the annuitants are to be taken into account — is in the Seminary. It would be a strained construction of the statutes to hold that this fund is to be considered as property of the Seminary for the purpose of taxation, but not for the purpose of exemption. The more natural and reasonable construction is, that personal property, which under the general tax laws would otherwise be taxable to the enumerated institutions, shall be exempt from taxation. The clause relied on by the respondents does not mean that in all cases personal property placed in the hands of a corporation or individual, as an accumulating fund for the future benefit of heirs or other persons, shall be assessed at all events to such persons, irrespective of exemptions, but that such shall be the method of taxation.

In other cases, and ordinarily under the statutes as they now stand, though formerly it was otherwise, personal property held in trust is taxable to the trustee, if within the Commonwealth. Pub. Sts. c. 11, § 20, cl. 5. But in case of personal property held in trust as an accumulating fund, the persons to be assessed shall be those for whose future benefit the property is held. For the purpose of taxation, it is to be deemed their property; they are the taxable owners. Nobody else can be assessed for it. In the present case, the Seminary, as a body politic and corporate, stands as the person for whose future benefit the fund is held, and therefore, according to the method prescribed by the general provision of law, would be taxable for it. But under the exemption clause its personal property is exempt from taxation. The general law, providing the rule for the method of taxation, does not have the effect to override the particular exemption. The fact that, by the Pub. Sts. c. 12, § 22, an action for the recovery of such a tax may be maintained against the trustee, does not change the effect of the other statutes.

Certiorari to issue.

WILLIAM KELLOGG vs. EDWARD P. DICKINSON.

SAME vs. SAME.

Hampshire. September 18, 1888. — October 18, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Promissory Note — Mortgage — Statute of Limitations — Presumption
of Payment.*

A promissory note was given on January 9, 1847, payable one year after date, and bore, under date of January 8, 1853, this indorsement, signed by the maker: "Paid on the within note ten dollars, and agree that I will not take any advantage of the statute of limitations." A mortgage of even date was given to secure the note by the maker, who held the mortgaged premises until his death, in 1880. At the trial of an action to recover the balance due on the note, and of a writ of entry to foreclose the mortgage, both brought in 1887, there was no evidence of any consideration for the agreement indorsed on the note, nor, beyond it, of any recognition or acknowledgment of the note, mortgage, or debt, or of any demand for the payment of the debt, interest, or rent until 1885. *Held*, that the note was barred by the statute of limitations, and that the presumption was, in the absence of evidence to control it, that the mortgage debt had been paid.

THE FIRST CASE was an action of contract against the administrator of the estate of Porter Dickinson, to recover a balance due the plaintiff as the holder and owner of the following promissory note: "Amherst, January 9th, 1847. For value received, I promise to pay James Kellogg, or order, five hundred dollars, in one year from date, with interest. Porter Dickinson." Upon the note was the following indorsement: "Amherst, January 8, 1853. Paid on the within note ten dollars, and agree that I will not take any advantage of the statute of limitations. Porter Dickinson." Writ dated May 9, 1887.

The first count of the declaration set out the making of the above note by the intestate, and alleged that such balance was due the plaintiff thereon. The second count was as follows: "And the plaintiff further says, that the defendant's intestate, on the 7th day of January, A. D. 1853, in consideration of ten dollars allowed on the amount of said note, and in further consideration of forbearance to sue the same, and delay and indulgence granted on the part of said James Kellogg, the payee of said note to the defendant's intestate, agreed with and promised

said payee that he, the defendant's intestate, would take no advantage of the statute of limitations as a defence against the said note set out in the first count. And the plaintiff says, that within six years now last past both the defendant's intestate and the defendant as his administrator have taken advantage of said statute, and refused to pay said note, because, as defendant claimed and alleged, it was barred by the statute of limitations. And the defendant is liable to pay the plaintiff the full amount of said note, and interest thereon as damage for the breach of his said agreement and promise." The answer set up, among other defences, the statute of limitations.

THE SECOND CASE was a writ of entry, dated May 7, 1887, to foreclose a mortgage of a parcel of land in Amherst, given by the intestate to James Kellogg, on January 9, 1847, to secure the payment of the above note.

The cases were tried together in the Superior Court, before *Brigham, C. J.*, who allowed a bill of exceptions, in substance as follows.

James Kellogg, the payee of the note, and the mortgagee, died on March 23, 1868, testate, and William Kellogg, his son, as the residuary legatee under the will, became the owner of the note and mortgage. Porter Dickinson, the maker of the note, and the mortgagor, died on November 13, 1880, and Edward P. Dickinson was appointed administrator of the estate on October 13, 1885.

William Kellogg testified that he had the charge of his father's business during the last two or three years of his life; that he had always known of the existence of the note and mortgage in question; that nothing had ever been paid on the note since January 7, 1853; that the demanded premises had been in the possession of Porter Dickinson, and occupied by him as a homestead, from the making of the note and mortgage until he died, and, after his death, by Edward P.; and that no rent had ever been paid for such premises. It also appeared in evidence that the wife of Porter Dickinson had been, before her marriage, brought up in the family of James Kellogg, the payee of the note, and that the relations between the families were friendly.

There was no evidence in the case that the note or mortgage had ever in any way been acknowledged or recognized as an

existing and unpaid debt since January 7, 1853, the time of the indorsement on the note, save as the indorsement itself constituted such acknowledgment or recognition, or that any demand for payment of debt, interest, or rent had been made from January 7, 1853, to the year 1885.

In the first case the defendant asked the judge to rule, that the note was barred by the statute of limitations; and in the second case, "1. that the action is barred; that if there has been no recognition of the debt, no payment either of the principal or interest, nor in any way admitting the note was unpaid for the period of twenty years, this would be good presumptive proof of payment, and would be a good defence to the action; 2. that the note in suit being a mortgage note, if there has been no recognition of it, no payment either of principal or interest, nor in any manner admitting that the note was unpaid within twenty years of bringing suit, this would be good presumptive evidence of payment, and the burden of proof would be upon the plaintiff; 3. that mere silent acquiescence in the plaintiff's demand is not sufficient to repel the presumption of payment, but there must be some positive act of unequivocal recognition, like part payment or written admission, or a clear and well identified verbal promise or admission intelligently made within the period of twenty years; 4. that there is no evidence in this case, in behalf of the plaintiff, to defeat or overthrow the presumption of payment."

The judge refused so to rule, and ruled that, if the indorsement on the note was made by Porter Dickinson, it had the legal effect of barring the defence by the defendant of the statute of limitations, but the defence of an actual payment was open to the defendant, the burden of proof being upon the defendant to prove such payment; that, though the defendant could not technically rely upon the statute of limitations, yet he was entitled to the presumptions that ordinarily flow from the lapse of time on the issue of payment; that the defence of the statute of limitations failing, and the payment of the note not being proved, the debt secured by the mortgage was not paid; and as the note and this debt were inseparable from the mortgage, that the mortgage was in full force, and in the second case the demandant was entitled to recover.

The jury returned a verdict for Kellogg in each case; and the defendant alleged exceptions.

T. G. Spaulding, for Kellogg.

W. Hamlin & F. E. Paige, for the administrator.

KNOWLTON, J. The first of these actions was brought to recover the balance of a promissory note for \$500, owned by the plaintiff, and signed by the defendant's intestate, dated January 9, 1847, payable one year after date, and bearing an indorsement in these words: "Amherst, January 8, 1853. Paid on the within note ten dollars, and agree that I will not take any advantage of the statute of limitations. Porter Dickinson." The second is a writ of entry to foreclose a mortgage given to secure payment of this note. Both suits were commenced on May 9, 1887. There was no evidence, outside of the papers, that the note or mortgage, or the debt secured by them, had in any way been recognized or acknowledged since January 7, 1853, the time of the indorsement, or that any demand for payment of debt, interest, or rent had been made from that time to the year 1885. The defendant in the first case contended, and asked the court to rule, that the note was barred by the statute of limitations. The court refused so to rule, and ruled that, "if the indorsement of the note declared on was made by Porter Dickinson, it had the legal effect of barring the defence by the defendant of the statute of limitations."

It is unnecessary to decide in this case whether a separate contract not at any time in the future to set up the statute of limitations as a defence to a promissory note, entered into for a valuable consideration by the maker of the note, would be void as against public policy. The statute of limitations would not begin to run upon such a contract so long as it remained unbroken. Assuming, without deciding, that in a suit upon the note, brought many years after its maturity, a contract of this kind would avail the plaintiff, either by way of estoppel, or to avoid circuity of action, as an answer to a plea of the statute of limitations by the defendant, the indorsement upon the note in the present case can have no such effect. For there was no evidence at the trial of any consideration for the agreement contained in it; and the court took from the consideration of the jury the second count in the declaration, alleging the exist-

ence and breach of such a contract, on the ground that there was no evidence to sustain it.

There were only two ways in which this agreement could be operative. It was a sufficient acknowledgment and new promise to take the note out of the statute. Perhaps, also, it created a technical estoppel against the maker. See *Burton v. Stevens*, 24 Vt. 131. *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652. *Quick v. Corlies*, 10 Vroom, 11.

Considered as an acknowledgment and new promise, it extended the time during which the note could be sued to the end of six years from the date of the indorsement, and no longer. In that aspect, it is therefore of no avail to the plaintiff in this suit. If, as appears probable, the agreement was signed under such circumstances, and was so acted upon, as to work an estoppel against the defendant, two questions arise: First, can such an estoppel be effective in any case after the expiration of six years from the act relied on as creating it? Secondly, if it can, was the language of this indorsement intended to have effect for a longer time than six years? The first of these questions it is unnecessary to consider, for the answer to the second is decisive of the case. The indorsement was written the day before the expiration of six years from the date, and five years less three days from the maturity of the note. It plainly indicates that the parties were considering the effect upon their rights of the lapse of time after the note was made. That, if taken advantage of by the maker, would enable him to avoid payment of it unless it should be sued within a year and four days. They may have made the mistake of believing that the six years named in the statute ran from the date of the note. Whether they did or not, the natural construction of the agreement makes it relate to the time which had already expired. It was in reference to that only that there was any occasion to stipulate. As applied to that, the agreement was pertinent and proper. If construed to cover an indefinitely long time in the future, it would be extraordinary, and contrary to the policy of the law. In the absence of an explicit statement to that effect, the parties cannot be supposed to have intended that a note, then nearly five years overdue, should be left unpaid, without further action or negotiation by either party, for more than six years longer. And the fact

that this agreement was made in connection with a payment of the small sum of ten dollars, indorsed upon the note, strengthens the probability that the parties contemplated merely a renewal of the obligation which would leave the maker liable for six years from that date. The promise, upon which the payee acted, was to refrain from pleading the statute in reference to the past, and not in reference to the future. There is, therefore, no estoppel applicable to this suit, and the action upon the note is barred by the statute of limitations. See *Cowart v. Perrine*, 6 C. E. Green, 101, 102.

In the second suit, the possession of the demanded premises by the mortgagor, and those claiming under him, for more than twenty years, without recognition of the mortgage or of the debt secured by it, was presumptive proof of payment, which, in the absence of evidence to control it, entitled the tenant to a verdict. *Cheever v. Perley*, 11 Allen, 584. *Andrews v. Sparhawk*, 13 Pick. 393, 400. *Howland v. Shurtleff*, 2 Met. 26. *Bacon v. McIntire*, 8 Met. 87. Mr. Justice Wilde, in *Andrews v. Sparhawk*, says: "Such length of time does not, it is true, operate as an absolute bar, for it may be satisfactorily accounted for by proof of special circumstances; but it furnishes strong evidence of the extinguishment of the claim or right set up, and is to be held conclusive unless the presumption can be repelled by other evidence." In *Cheever v. Perley*, it is said that, to rebut the presumption of payment, "some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well identified verbal promise or admission, intelligently made within the period of twenty years, is required."

Probably the learned judge who presided at the trial was of opinion that the indorsement upon the note took the mortgage out of the rule laid down in these cases. But, with the construction which we have given to the indorsement, the instructions to the jury were erroneous.

Exceptions sustained.

GEORGE H. THOMAS vs. CHARLES E. BLASDALE.

SAME vs. CLARA V. DOLE.

Hampden. September 25, 1888. — October 18, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Slander — Accusation of Crime — Declaration — Demurrer — Law and Fact.

Two declarations in actions of slander against different persons each alleged that the respective defendants, in speaking of the death of the plaintiff's wife, accused him of the crime of murder, the words in one case being, "He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else; he is to blame for it"; and in the other case, "He knows how she came to her death; he killed her; he is to blame for her death; there was foul play there." Held, on demurrer, that the former words in their natural sense did not import a charge of murder, but that it could not be said that the latter words might not fairly be considered to impute such a crime.

TWO ACTIONS OF TORT for slander. The declaration in the first case was as follows:

"And the plaintiff says the defendant publicly, falsely, and maliciously accused the plaintiff of the crime of murder, by words spoken of the plaintiff substantially as follows, to wit: 'He (meaning the plaintiff) killed her (meaning the plaintiff's wife, Mary J. Thomas) by his bad conduct (meaning the bad conduct of the plaintiff), and I (meaning the defendant) think he knows more about her being drowned than anybody else. He (meaning the plaintiff) is to blame for it.'"

The declaration in the second case was as follows:

"And the plaintiff says the defendant publicly, falsely, and maliciously accused the plaintiff of the crime of murder, by words spoken of the plaintiff substantially as follows, to wit: 'He (meaning the plaintiff) knows how she (meaning the plaintiff's wife) came to her death (meaning the death of the plaintiff's wife). He (meaning the plaintiff) killed her (meaning the plaintiff's wife). He (meaning the plaintiff) is to blame for her death (meaning the death of the plaintiff's wife). There was foul play there.' To the great damage of the plaintiff."

The defendants demurred to the declaration in each case, on the ground "that the declaration does not state a legal cause of action substantially in accordance with the rules of law, in that

the alleged slanderous words do not, by their natural import, or in connection with any facts or explanations stated in the declaration, in any manner charge or impute the crime of murder, and are not in themselves actionable."

The Superior Court sustained the demurrers, and ordered judgments for the defendants; and the plaintiff appealed to this court.

H. W. Ely, for the plaintiff.

G. D. Robinson, for the defendants.

C. ALLEN, J. The declarations in these cases set forth no extrinsic circumstances which might give significance to the words alleged to have been spoken by the respective defendants, and we have only to consider whether the words themselves, taken in their natural sense, and without a forced or strained construction, may fairly import a charge of criminal homicide. *Young v. Cook*, 144 Mass. 38. *Boynton v. Shaw Stocking Co.* 146 Mass. 219, 221. *Twombly v. Munroe*, 136 Mass. 464.

In the first case, the words are, "He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else. He is to blame for it." The explanation that the killing was by his bad conduct shows that no charge of killing in a criminal sense was intended, or fairly to be understood. In this case the demurrer was properly sustained, and the judgment for the defendant is affirmed.

In the second case the words are, "He knows how she came to her death. He killed her. He is to blame for her death. There was foul play there." The charge of having killed her is general. The statement that there was foul play there, may naturally be found to signify something more than mere bad conduct. The words, "He is to blame for her death," taken with the context, do not necessarily weaken the force of the more direct charges. Taken as a whole, the court cannot say that these words may not fairly be considered to impute a crime to the plaintiff. It has long and often been held that a general charge of killing, unexplained, is sufficient. *Cooper v. Smith*, Cro. Jac. 423. 1 Roll. Abr. 77. 1 Com. Dig., Action upon the Case for Defamation, D. 2. *Eckart v. Wilson*, 10 S. & R. 44. *Taylor v. Casey*, Minor, (Ala.) 258. *Hays v. Hays*, 1 Humph. 402. In this case, the demurrer should have been overruled.

Ordered accordingly.

ABBY ADAMS vs. INHABITANTS OF CHICOPEE.

Hampden. September 25, 1888. — October 18, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Exceptions — Personal Injuries — Defect in Sidewalk — Smooth, Level,
and Slippery Ice.*

If smooth, level, and slippery ice is formed upon the surface of a sidewalk, or in depressions therein, by reason of its improper construction or of its condition, a defect may be found to exist such as will render a town liable for injuries caused by falling upon it.

At the trial of an action to recover for injuries so caused by falling upon such an icy sidewalk, the plaintiff's counsel argued to the jury that recovery might be had if the fall was upon such ice so formed, and afterwards reasserted his claim in the same terms, in reply to a question by the presiding judge during the charge. The judge in his instructions to the jury gave full instructions on this branch of the case, stating among other things the substance of the plaintiff's claim, and at the close of the charge the plaintiff excepted generally to so much thereof as related to such ice so formed. *Held*, that the exception was well taken.

TORT for personal injuries occasioned to the plaintiff by a defect in a sidewalk of a street in the defendant town. Trial in the Superior Court, before *Barker, J.*, who allowed a bill of exceptions, which, so far as material, was as follows.

The plaintiff was injured, in the month of January, by falling upon ice upon the sidewalk, which was four feet wide, covered by asphalt, or concrete, laid upon the soil, without curbing on either side, and was constructed by the defendant town. There was evidence tending to show that the soil at the edge of the concrete walk, on either side, was higher than the walk, so that water did not flow off; that, at the point where the plaintiff fell, there was a depression in the surface of the concrete walk, to the depth of from one and a half inches to two inches and three quarters at the deepest point, and running out to a level with the rest of the walk in a distance of three or four feet in length and two feet in width, and that water was collected and held there, by reason of the conditions stated, whenever rain fell, or snow or ice thawed; that the sidewalk sloped, so that the water flowed off the same, except such as was retained by the alleged hollows and depressions in the concrete, and by the soil on either side of it; that, at the time of the alleged injuries, the

water over the sidewalk and in the depression was frozen ; and that the surface of the ice was smooth, level, and slippery.

The bill of exceptions recited, that "the plaintiff made no specific requests for instructions, but in the argument to the jury her counsel claimed that it was competent for the jury to find the walk defective, because of the formation of ice upon it, produced by such a condition of the surface of the walk, and of the higher edges, and of the general level of the walk being lower than the land on either side, as caused water to be collected and held upon it in the depressions, and over other parts of the walk, and the water was formed into ice, with smooth, level, and slippery surface ; and during the charge, in reply to an inquiry from the presiding judge, asserted such claim."

Upon this branch of the case the judge instructed the jury, among other things, as follows :

"The mere fact that a sidewalk of no unusual slope or construction is slippery by reason of a smooth coating of ice, from whatever cause arising, does not constitute a defect. That is, a smooth coating of ice upon a sidewalk of no unusual slope or construction, even if that ice comes to be there by reason of the freezing of water that stands on it, without outlet, still, if it has no unusual slope in its make, or nature of construction, so as to make it peculiarly dangerous, then the walk will not be defective merely because its construction is such that, in the usual action of the elements, ice forms upon it when freezing weather comes, when there is water upon the walk. The freezing of smooth, level ice does not constitute a defect in any way, and the fact that there are such hollows or basins in the sidewalk as to make them fill with level water which cannot pass off, and that level water freezes, if it freezes into smooth, level ice, does not constitute a defect in the way. But, on the other hand, if the slope, or construction, or formation of the sidewalk is such as to induce the formation upon any portion, or part of it, of masses of ice, which, by reason of their shape, or angle of inclination, are peculiarly dangerous, or more than ordinarily dangerous, having something added to them more than the mere quality of level, smooth, slippery ice, then the fact that the conformation of the sidewalk is such as to produce that kind of masses of ice upon it would constitute a defect. For instance,

you take a sidewalk which is a level, or substantially level sidewalk; if there is in it some depression where water stands, if the nature of the construction of the sidewalk is such that the water merely stands level, and when it freezes, it freezes into a smooth, level expanse of ice, that does not constitute a defect. . . .

“So, if there was a formation of the sidewalk tending to make ice that was bulgy, hummocky, and uneven, or in any such shape as to make the travelling over it of a person using due care unusually dangerous and difficult, beyond the travelling over smooth, level ice, then that formation of sidewalk would be sufficiently defective to render a town or city liable. If you find that there was such a formation of this sidewalk as to produce merely, in the natural and ordinary operation of things, smooth, level ice, then that formation would not be a defect.”

At the end of the charge, the plaintiff's counsel excepted to so much of the charge as related to smooth, level, and slippery ice not being a defect under the conditions named in the charge.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

G. D. Robinson, for the plaintiff.

G. M. Stearns, (*W. W. McClench* with him,) for the defendant.

KNOWLTON, J. At the trial of this case, there was evidence tending to show that the concrete walk upon which the plaintiff fell was of such construction, or was in such condition, as to retain water in a hollow or basin upon it, and so, in freezing weather, to cause the formation of smooth, slippery ice.

Upon this part of the case the jury were instructed that “the freezing of smooth, level ice does not constitute a defect in any way, and the fact that there are such hollows or basins in the sidewalk as to make them fill with level water which cannot pass off, and that level water freezes, if it freezes into smooth, level ice, does not constitute a defect in the way.” Also, that if they found “that there was such a formation of this sidewalk as to produce merely, in the natural and ordinary operation of things, smooth, level ice, then that formation would not be a defect.” “The plaintiff's counsel excepted to so much of the charge as related to smooth, level, and slippery ice not being a defect under the conditions named in the charge.”

It is strenuously argued for the defendant, that the exception was too general, and that it is not open to the plaintiff to call in question these instructions. There may be cases in which an exception taken in this form would not sufficiently indicate to the presiding judge the particular parts of his charge which were objected to, nor give him the opportunity which he ought to have to correct an error, if, upon his attention being called to it, he found that he had made one. But in this case we are of opinion that the statement in relation to the legal propositions which were intended to be excepted to, was well understood by the presiding judge and the defendant's counsel. The exceptions show that the plaintiff's counsel contended, in his argument to the jury, that the town would be liable for an accident happening upon smooth, slippery ice, formed under the conditions afterwards referred to in the quoted parts of the charge. The substance of the plaintiff's contention was stated in the instructions, and the plaintiff's counsel, in reply to a question by the judge, during the charge, asserted his claim in the same terms as before.

The question of law involved in the exception was decided in the case of *Pinkham v. Topsfield*, 104 Mass. 78. In that case the jury were instructed, that, "if there was some special cause for the formation of ice in that particular locality, owing to the construction or condition of the road, it would be a defect, if it rendered the way unsafe and dangerous, though it was only smooth and slippery"; and the ruling was unanimously sustained by this court. The doctrine is stated in *Fitzgerald v. Woburn*, 109 Mass. 204, in similar terms; and in the leading case of *Stanton v. Springfield*, 12 Allen, 566, it is said that "a way may be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality." In the decision in *Billings v. Worcester*, 102 Mass. 329, there is nothing in conflict with this doctrine, although some of the reasoning in the opinion seems to lead away from it; but through the change in the law by the enactment of the statute of 1877, c. 234, that reasoning has become inapplicable to recent cases. Pub. Sts. c. 52, § 18. *Post v. Boston*, 141 Mass. 189. *Blake v. Lowell*, 143 Mass. 296.

Exceptions sustained.

COMMONWEALTH vs. THOMAS KENDRICK.

Worcester. October 1, 1888. — October 18, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Intoxicating Liquors — Analysis — Evidence.

At the trial of a complaint for unlawfully keeping intoxicating liquors for sale, there was evidence that W. E. D., an officer of the town of N. B., after seizing bottles of beer on Saturday, took them directly to the lockup and placed them in a cell, locking the door, and retaining the only key he knew of; that on the evening of the following Monday he took out of the cell one of the bottles, a pint bottle, put it into a paper box, sealed the box, and directed it to the State assayer, and sent it to him by express; that an assistant of the assayer on the next day analyzed beer out of a pint bottle which was in a box addressed to the State assayer, the only bottle received that day; and that the beer was marked, "From W. E. D., of N. B."; but it was not stated whether the mark was on the box or on the bottle. *Held*, that there was sufficient evidence that the beer analyzed was a part of that seized to warrant the admission of evidence as to its intoxicating quality.

COMPLAINT to a trial justice, alleging that the defendant, on February 11, 1888, at North Brookfield, did unlawfully keep intoxicating liquors for sale.

At the trial in the Superior Court, on appeal, before *Sherman, J.*, the jury returned a verdict of guilty, and the defendant alleged exceptions, the substance of which appears in the opinion.

W. W. Rice & H. W. King, (*C. M. Rice* with them,) for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

KNOWLTON, J. The only question in this case is whether the testimony of the witness Bennett, in relation to the intoxicating quality of the beer which he analyzed, was competent.

The provisions of the St. of 1882, c. 221, in regard to sending samples of liquors to the State assayer, and requiring that a certificate of an officer shall accompany the beer, are applicable only to cases where the certificate of the assayer is sought to be introduced in trials for the forfeiture of liquors, and they do not preclude the Commonwealth from showing by oral testimony that some of the liquor kept for sale has been put into the hands of a competent expert, and has been found by him to be intoxicating. *Commonwealth v. Spear*, 143 Mass. 172.

The objection to the admission of the evidence in the present case rests upon the alleged insufficiency of the proof that the beer analyzed was a part of that seized upon the defendant's premises. Wilder E. Deane, an officer at North Brookfield, testified that, after seizing the beer, he and other officers carried it directly to the lockup and put it in a cell; that he locked the door of the cell and took the key, there being no other to that door so far as he knew; that, this being on Saturday, he went to the lockup in the evening of the following Monday, which was February 13th, and took out one of the bottles of beer, a pint bottle, put it in a paper box, sealed the box, and directed it to Mr. Sharples, the State assayer, at Boston, and sent it to him by express. This was sufficient evidence that the beer sent was a part of that seized. The witness Bennett was an assistant of the State assayer, and he testified that he analyzed beer on February 14th, and that it was in a pint bottle, which was in a box addressed to the State assayer, and was the only bottle received that day. He said the beer was marked, "From Wilder E. Deane, of North Brookfield," without stating whether the mark was upon the box or upon the bottle.

The facts, that the beer was sent by a common carrier, whose methods of transportation are commonly regular and reliable, that it was received on the very day when that sent by Deane would be expected to reach its destination, that it was addressed to the State assayer, that it was in a pint bottle, which was the only bottle received that day, and that it was marked, "From Wilder E. Deane, of North Brookfield," were sufficient to warrant the presiding judge in making a preliminary finding that it was the same delivered by Deane to the express company, and in submitting the evidence to the jury. To make the testimony competent, it was unnecessary that the identity of the beer should be conclusively proved. It was enough, if the judge deemed the evidence sufficient fairly to establish its identity. It then became the duty of the jury to consider the testimony, and to give weight to the statement of the witness as to the quality of the beer, or not, according as they should or should not find that the beer was a part of that kept by the defendant. *Commonwealth v. Robinson*, 146 Mass. 571.

If the defendant desired to raise the question whether there

was sufficient evidence in the case to warrant a verdict of guilty, he should have requested a ruling upon that point after the evidence was all in. *Exceptions overruled.*

SAMUEL C. BRIGHAM *vs.* COUNTY OF WORCESTER & another.

Worcester. October 2, 1888. — October 18, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Relocation of Way — Assessment of Damages — Order of County Commissioners.

County commissioners, on a petition to them under the Pub. Sts. c. 49, § 13, by the mayor of a city, pursuant to a vote of the city council, for the relocation of a way wholly therein, located it anew, and took in so doing a part of an abutter's land, their order concluding as follows: "No damages were claimed or allowed, and it is ordered by said commissioners that all costs and expenses of construction in the matter of this relocation be paid by the city." *Held*, on a petition by the abutter, under § 32, for a jury to assess his damages, that the city was liable under the order for all land damages that might arise.

PETITION to the Superior Court, under the Pub. Sts. c. 49, § 13, against the county and city of Worcester, for a jury to assess the damages to the petitioner's land by the relocation of Grove Street in that city.

At the trial before *Aldrich*, J., it appeared in evidence, by the record of the county commissioners, that, in pursuance of a vote passed by the city council, the mayor of Worcester petitioned the county commissioners for a relocation of a highway wholly therein, called Grove Street; that, after due notice and proceedings, the county commissioners ordered that the prayer of the mayor be granted, and proceeded to locate anew the street, taking a portion of the petitioner's land in so doing; and that the only order in the proceedings in respect to damages was at the close of the order of the county commissioners, as follows: "No damages were claimed or allowed, and it is ordered by said commissioners that all costs and expenses of construction in the matter of this relocation be paid by the city of Worcester."

The judge directed the petitioner to elect as to which respondent he would proceed against. The petitioner elected to

proceed against the city, whereupon the counsel for the latter requested the judge to rule that the petition could not be maintained against it; but the judge refused so to rule, and submitted the case to the jury as against the city.

The jury returned a verdict for the petitioner; and the city alleged exceptions.

F. P. Goulding, for the city of Worcester.

B. W. Potter, for the petitioner.

C. ALLEN, J. The language of the order of the county commissioners does not in terms impose upon the city the duty of paying land damages, if there should prove to be any, and it certainly is not felicitously chosen to express that idea; but looking at it in the light of the circumstances, we think it will and must bear that construction.

The proceedings were instituted under the Pub. Sts. c. 49, § 13, which authorize the county commissioners to locate anew a road within a town (or city; Pub. Sts. c. 3, § 3, cl. 23; c. 28, § 2;) and the mayor of Worcester petitioned for the relocation of the street in question in pursuance of a vote passed by the city council. The street was wholly within the city. It was the duty of the commissioners to assess the expense "upon the abutters, or upon the petitioners, or upon the town or county." The word "expense," as thus used in the statute, includes damage to landowners. *Damon v. Reading*, 2 Gray, 274. It is also specially provided, by § 14 of the same chapter, that, if damage is sustained by any persons in their property by locating anew a highway, the commissioners shall estimate the amount, and in their return state the share of each separately. There is no opportunity for them to perform this duty except when the case is before them, and prior to or at least contemporaneously with the adoption of the order for the relocation. The time within which an application for a jury may be made dates from the time of the adoption of the order. Pub. Sts. c. 49, § 33. They undertook to do their full duty in the premises. They found that no damages were claimed or allowed; and then proceeded to assess upon the city "all costs and expenses of construction in the matter of this relocation."

This order must be construed with reference to the provisions of § 32, providing that a party aggrieved by the doings of the

commissioners in the estimation of his damages may have a jury, and may make application therefor to the Superior Court. It had already been determined by this court, as the true construction of the earlier statutes corresponding to the above section, that a party may make application for a jury, although he has not claimed damages before the county commissioners. *Gilman v. Haverhill*, 128 Mass. 36. It must be presumed that the commissioners intended to cover the whole ground, and to make a return which would include the whole expense incident to the relocation of the street. They must have been aware that a landowner would be entitled to make an application to the Superior Court to assess his damages, although he made no claim of damages before them. Through some inadvertence, probably, or perhaps through the expectation that, in point of fact, no damages would be claimed in the future, their language is inexact; but it seems to have been their intention to put the whole expense of the relocation upon the city. They say, in substance, "We do not think there are any land damages, but we order the city to pay all the costs and expenses, whatever they are."

Exceptions overruled.

MARY ANN KELLY vs. INHABITANTS OF BLACKSTONE.

Worcester. October 2, 1888. — October 18, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Personal Injuries — Knowledge of Defect in Highway — Due Care.

A woman sixty-nine years of age was returning home after dark from her daughter's house, to which she was in the habit of going, upon a footpath along the east side of a way. She knew there was a bad place in the path on that side, and usually went to and fro on the west side, but on this occasion she crossed to the east side because she heard persons approaching on the west side, and, while not thinking of the road, fell into a hole in the path and was injured. *Held*, in an action to recover for her injuries, that there was evidence of due care to be submitted to the jury.

TORT for personal injuries occasioned to the plaintiff by reason of the want of a railing at the side of a highway in

the defendant town. Trial in the Superior Court, before *Aldrich, J.*, who allowed a bill of exceptions, which, so far as material, was as follows.

The only question was whether the plaintiff was in the exercise of due care at the time of the accident. Upon the easterly side of the way was a footpath about eighteen inches wide, unguarded by a railing, from which the land sloped sharply to the east. From this path, and down the slope, extended another footpath, which was so worn by travel and by the wash of water, that, at the point where it intersected with the path beside the way, there was a hole extending into that path for half its width.

The plaintiff testified that she was sixty-nine years old, and had lived for many years on the east side of the way, to the north of the place in question; that she had a married daughter, who had lived for several years on the west side of the way, to the south of the same place; that she had been in the habit of calling upon her daughter quite frequently, and had generally walked to and from her house; that she usually went upon the west side of the road, crossing it near her own house; that she called upon her daughter in the latter part of November, 1886, at about nightfall; that after it had become quite dark she started to return home alone; that she thought she heard the footsteps of persons approaching on the west side of the way; that she thereupon crossed over to the east side, and walked at a moderate pace towards her home along the path; and that after she had taken a few steps she fell into a hole or wash-out at the side of the road, and rolled down the slope, receiving the injury. In the course of a long cross-examination, she testified that the only reason why she usually went to and from her daughter's house on the west side of the way, was, that it was the most natural for her, and the most pleasant for her to walk on; that because of the bank on the east side she was afraid to go on that side; that she knew of the path on the east side, and of the bad place in it; that at the time she fell she did not think anything about that place, and was not looking for it; that she did not remember that she looked down at the ground as she walked along; that she had no recollection of seeing the place in the way, or of looking at it, or of thinking about it; and that the only reason she

had for crossing the road after she left her daughter's house was because she heard persons coming on the west side, and she crossed over so as to avoid meeting them.

The judge refused to rule, as requested by the defendant, that there was no evidence of due care on the part of the plaintiff. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. Hopkins, (F. N. Thayer with him,) for the defendant.

T. G. Kent & G. T. Dewey, for the plaintiff.

DEVENS, J. The only question presented by the exceptions is whether there was sufficient evidence of due care on the part of the plaintiff to be submitted to the jury.

The plaintiff was walking on the east side of the highway, where there was a path about eighteen inches wide, suitable for travellers on foot, and at a slow or moderate pace. From this path another path descended the slope of the embankment from top to bottom, a distance of about sixteen feet; the travel down this latter path and the wash of water had so worn it that at its upper end it extended into and cut the path along the side of the way one half its width, creating a hole, as the plaintiff testified, into which she fell, and thence rolled down the slope. It was early in the evening, but quite dark, and the plaintiff was returning from her daughter's house, which was on the west side of the highway, to her own, which was on the easterly side. She did not usually walk on this side of the road, and had not done so in going to her daughter's house, being in the habit of crossing the highway, both going and returning, near her own house. On the evening of the accident, she crossed to the easterly side of the road, as she states, because she heard persons approaching on the west side of the road. She knew that there was a bad place made on the east side by the intersection of the path on that side with the path which descended the slope. Her testimony, which is all there was as to her knowledge of this defect, was given at great length in her cross-examination, which is fully reported, and is somewhat confused and confusing as to the extent of her knowledge of its exact character.

It certainly does not clearly appear thereby that she knew there was at that point "a wash-out at the side of the road," or "a hole," which are the terms she used in describing the place

into which she fell. Nor, even if she had full knowledge of the exact character of the defect, would it necessarily follow that she failed in the exercise of due care because she crossed to the easterly side of the road to avoid meeting strangers after nightfall, or because, as she states, she was not thinking about the road when she fell. A traveller may have his attention momentarily diverted from the defects in the way, even if known to him, and yet be in the exercise of due care.

In *Weare v. Fitchburg*, 110 Mass. 334, the plaintiff was called suddenly home, from the house of a neighbor where she was visiting, to attend her children, and, running along a footpath, struck against a large stone, which she knew to be therein, but of which she was not thinking at the time; and it was held that this was not conclusive evidence that she was careless, and that whether she was so or not was, under all the circumstances, to be decided by the jury.

In a similar way, in the case at bar, the anxiety which the plaintiff might have had in view of her age and her timidity as to the approaching strangers, together with the darkness of the night, the pace at which she was walking, and her knowledge of the defect, whether more or less, as it may have been found to be, were all to be considered in determining whether she had conducted herself with that care and circumspection which ought reasonably to have been exercised by her as a traveller, and the question was properly submitted to the jury. *Reed v. Northfield*, 13 Pick. 94. *George v. Haverhill*, 110 Mass. 506, 513. *Barton v. Springfield*, 110 Mass. 131. *Dewire v. Bailey*, 131 Mass. 169, 170.

The defendant considers the case of *Gilman v. Deerfield*, 15 Gray, 577, to be decisive in its favor. But in that case, as remarked by Mr. Justice Colt in *Weare v. Fitchburg*, *ubi supra*, "The court declared that it was impossible to find on the facts reported that the plaintiff took the least possible degree of care to preserve or protect himself from the peril to which he was exposed, and that his testimony not only wholly failed to show that there was the exercise of the degree of care which men of ordinary prudence use, but was equivalent to a positive declaration that he was utterly incautious, and took no care of himself whatever." In this view, the case at bar is clearly distinguishable from it.

Exceptions overruled.

JOHN ALLEN vs. INHABITANTS OF GARDNER.

Worcester. October 2, 1888. — October 18, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Way — Repairs by Highway Surveyor — Liability of Town for Damages —
Petition to Selectmen.*

If a highway surveyor, who has exhausted the appropriation for his district, makes repairs on a way within the ordinary scope of his authority, but without the written consent of the selectmen, the town, though not bound to pay therefor, is liable, under the Pub. Sts. c. 52, § 15, for damages thereby caused to an abutter.

A petition to the selectmen for compensation for such damages alleged that the petitioner was an owner of land on a way, and sufficiently described it; that he had suffered damage from the removal of earth in front of it for the purpose of repairing the way, whereby he became entitled to compensation; and that the repairs were "ordered and made under the direction and authority" of the selectmen, in October, 1885. *Held*, that the petition was sufficient, under the Pub. Sts. c. 52, § 15.

PETITION to the Superior Court, under the Pub. Sts. c. 52, §§ 15, 16, for a jury to assess damages caused to the petitioner's land in repairing Pearl Street in the defendant town. Trial in the Superior Court, before *Mason, J.*, who allowed a bill of exceptions, which, so far as material, was as follows.

There was evidence that, on October 15 and 16, 1885, one of the highway surveyors of the defendant town, within whose district Pearl Street was situated, for the purpose of repairing it removed earth between the wrought part of the way and the petitioner's land, leaving there a steep embankment, and destroying a path leading from his house to the street; and that the surveyor used the earth so removed in filling up and raising other parts of Pearl Street. It was admitted that the highway surveyor, who had exhausted the appropriation allotted to him for repairs in his district, had consulted the selectmen relative to the repairs on Pearl Street, and had received their oral, but not their written, consent to make them; and that the surveyor made the repairs, believing them to be necessary.

The petitioner duly filed a petition to the selectmen for compensation for his damages, dated September 28, 1886, and signed

by him; but the selectmen refused to estimate his damages. The petition was as follows:

"The undersigned, John Allen, owner of land on the west side of Glazier Street and the north side of Pearl Street, and adjoining said Glazier and Pearl Streets, in the town of Gardner aforesaid, respectfully represents that he has sustained and suffered damage in his property by reason of the removal of a portion of the bank of earth in front of his land on said Pearl Street, adjoining his said land and outside the travelled and worked portion of said highway; said removal was done for the purpose of repairing said Pearl Street, for which he is entitled to compensation; that the removal of said portion of the bank of earth in front of his land on Pearl Street was ordered and made under the direction and authority of your honorable board of selectmen, in the month of October, 1885, and he petitions your honorable board to award him such compensation therefor as to law and justice shall appertain."

Upon these facts, the judge ruled that the petitioner was not entitled to recover, and directed the jury to return a verdict for the respondent. The petitioner alleged exceptions.

H. C. Hartwell & E. D. Howe, for the petitioner.

E. P. Pierce, (*J. A. Stiles* with him,) for the respondent.

KNOWLTON, J. The petitioner's estate was damaged by repairs made upon the street in front of it by one of the highway surveyors of the defendant town. His injury was of the kind for which compensation is intended to be provided by the Pub. Sts. c. 52, § 15; and the only matters alleged as grounds of objection to his recovery are, first, that the highway surveyor, having previously used all the money appropriated for his district, made the repairs without the written consent of the selectmen; and, secondly, that the petition for the allowance of damages, filed with the selectmen, was not in proper form, nor sufficient to meet the requirements of the statute.

It has been held in many cases, that, under circumstances like those here disclosed, a liability to pay for repairs cannot be created by a highway surveyor against a town. *Sikes v. Hatfield*, 13 Gray, 347. *Todd v. Rowley*, 8 Allen, 51. *Goddard v. Peterham*, 136 Mass. 235. But a highway surveyor is a public officer, charged with the duty of keeping the roads in his district in

repair, and his official acts, done within the ordinary scope of the authority of such officers, after his public money is all expended, and without the written consent of the selectmen, are not illegal. The town cannot be made liable for the cost of them, but it may pay for them if it chooses so to do. *Jones v. Lancaster*, 4 Pick. 149. *Curran v. Holliston*, 130 Mass. 272. And so far as they cause damages to the estates of individuals by repairs upon the highways, they are treated as done under competent authority. This has been directly adjudicated in *Elder v. Bemis*, 2 Met. 599, 604, and in *Benjamin v. Wheeler*, 15 Gray, 486, 489, in regard to similar acts where damage was caused by a surveyor's turning a watercourse in such a way as to injure an adjacent estate, without the approbation of the selectmen, and in violation of the Pub. Sts. c. 52, § 14.

The principle upon which these cases rest is equally applicable to the case at bar. And it is obvious that a different rule would be likely to work great injustice; for landowners along a highway often have no means of knowing whether the appropriation for the use of a highway surveyor has been exhausted, or whether or not he is working with the written consent of the selectmen; and in case of injury to their estates, if they could not hold the town responsible for the consequences of his official acts, they would be without remedy.

The petition filed with the selectmen set out, either in direct averment or by plain implication, all that was necessary under the statute. The petitioner alleged that he was the owner of land, which, without fully describing it, he sufficiently designated; that he had suffered damage in his property by the removal of earth from the street in front of it; that the work had been done for the purpose of repairing the street; and that he was entitled to compensation, which he petitioned the board to award him. He was not strictly accurate in the statement in his petition that the repairs were "ordered and made under the direction and authority" of the selectmen. But the Pub. Sts. c. 52, § 3, provide that money used by highway surveyors in their several districts shall "be carefully and judiciously expended . . . under the direction of the selectmen," and repairs made by a highway surveyor might well be supposed to come under the statute. The selectmen could not have been misled by this

inaccuracy; for the petition did not refer to any order or adjudication, such as would have been made under the Pub. Sts. c. 49, §§ 65-72, in proceedings in relation to specific repairs, and it did refer to the time when the work of repairing was done.

The petition could not properly have been treated as brought under the statute last cited. It was imperfect and informal; but strict rules of pleading are not to be applied in proceedings of this kind, and we are of opinion that it was sufficient. *Wilbur v. Taunton*, 123 Mass. 522. *Exceptions sustained.*



OLD COLONY RAILROAD COMPANY vs. CITY OF FALL RIVER
& another.

Suffolk. January 27, 30, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

*Grade Crossing of Railroad by Way — Laying out and Construction by
City — Certiorari — Injunction.*

If a city lays out a way forty feet wide across a railroad at grade, under an order of county commissioners authorizing it to be laid out fifty feet wide, the only remedy of the railroad company is by a petition for a writ of certiorari.

If a railroad company refuses to construct its proper proportion of a way laid out across its location at grade, under the Gen. Sts. c. 63, §§ 57-60, (Pub. Sts. c. 112, §§ 119, 123-125,) the city within which it is situated will not be enjoined from entering and constructing the entire way across such location.

BILL IN EQUITY, filed May 5, 1886, to restrain the city of Fall River and Anthony Thurston, its surveyor of highways, from removing fences on either side of the plaintiff's location at and across Pearce Street in that city, and from constructing the street across such location.

The bill alleged, that in 1874 the mayor and aldermen and common council of Fall River attempted to lay out Pearce Street across the plaintiff's railroad in that city at grade; that they petitioned the county commissioners for leave to do so, but the proceedings had were so imperfect that the attempted laying out was void; that nothing had been done, in fact, to open Pearce Street for travel across the railroad location, although

the city council at times had so voted; that the plaintiff had always maintained fences across Pearce Street along the line of its location, and rightfully had the exclusive use of the same; that there were three tracks over the location, and that upwards of one hundred trains passed daily over the same; that at a meeting of the city council, held May 3, 1886, the following vote was passed: "Ordered, that the surveyor of highways forthwith notify the Old Colony Railroad Company to take down the fences now standing across Pearce Street, and to put the public crossing there in condition for travel, on or before Thursday next; that the surveyor of highways, in case said fences shall remain standing after said Thursday, shall take the same down, put said crossing in order for travel, and prosecute all proceedings necessary to establish the title of the public thereto."

The bill also alleged that notices had been served on the president of the plaintiff corporation and upon one of its directors, of like tenor with the following: "Fall River, May 4th, 1886. To ———: Dear Sir,—In accordance with an order passed by the city council yesterday, May 2d, I hereby notify the Old Colony Railroad Company to take down the fences now standing across Pearce Street in this city, on both sides of its road, and to put the crossing there in proper condition for travel on or before Thursday next. Respectfully, Anthony Thurston, Surveyor of Highways."

The bill further alleged that such action on the part of the city and the highway surveyor would constitute an unwarrantable interference with the plaintiff's rights, and was not required to protect any rights of the city or the public, if any, in Pearce Street, and would interfere with the operation and running of the plaintiff's railroad, and would imperil the safety of the public and constitute a nuisance; and that the defendant city threatened to take down the fences at Pearce Street, and to enter upon the plaintiff's tracks, to prepare it for public travel; and the prayer of the bill was for an injunction to prevent the same, and for further relief.

The answer, after reciting the proceedings before the county commissioners, alleged that within one year of the laying out of Pearce Street by the mayor and aldermen and common council, on or about December 28, 1874, the street was worked and opened

to the public use, and had been so used ever since, except so far as the plaintiff had obstructed it; that at the time of the laying out, and at other times, the plaintiff was duly notified to take down and remove the fences within the limits thereof, but had neglected and refused so to do; that about the year 1879 the plaintiff rebuilt fences then standing within the limits of Pearce Street, and extended them so as to close up that portion of the street then open across its location and used by foot passengers; that the plaintiff moved the fence upon the easterly side of its location farther on and upon Pearce Street; that the fences were a public nuisance, and obstructed the use of the street by the public, who were entitled thereto, as a duly laid out public highway; and that the order of the city council of May 3, 1886, was legal and proper, and the defendant Thurston, named therein, was the legally appointed surveyor of highways of the city.

Hearing before *Holmes, J.*, who reported the case for the consideration of the full court, such order or decree to be made as upon the facts equity might require. The report was in substance as follows.

A preliminary injunction was issued as prayed for. The defendants justify the proposed construction of the street across the location of the railroad under an alleged laying out of the way at grade in 1874, under the Gen. Sts. c. 63, §§ 57, 59.*

* The Gen. Sts. c. 63, §§ 57-60, are as follows :

“ Section 57. If after the laying out and making of a railroad the public convenience and necessity require a turnpike road or other way to be laid out across it, such road or way may be so laid out and established when the county commissioners so authorize and direct; and all expenses of and incident to constructing and maintaining the road or way at such crossing shall be borne by the county, city, town, or corporation owning the same.

“ Section 58. The commissioners before so laying out any way across a railroad shall cause due notice to be given to the corporation that it may be heard in the premises; and after hearing all parties interested they may lay out the same, directing whether the crossing shall be over, under, or at a level with the railroad, but not permitting it to be at a level unless public necessity so requires. If the way shall pass over the railroad they shall determine and specify in what manner the bridge necessary for the crossing shall be constructed. Such ways shall be so made as not to obstruct or injure the railroad.

“ Section 59. The mayor and aldermen or selectmen, before laying out a way across a railroad, shall apply to the county commissioners for permis-

On March 31 and on August 8, 1873, petitions were presented to the city council of Fall River for the laying out of Pearce Street. After notice and hearing, the mayor and aldermen, on November 3, 1873, directed the mayor to petition the county commissioners for leave to lay out Pearce Street from North Main Street to Davol Street, fifty feet wide, and "to cross the track of the Old Colony Railroad at grade." On November 7, 1873, the mayor petitioned the county commissioners, in behalf of the mayor and aldermen, for leave to lay out Pearce Street, a private way thirty feet wide running up to the railroad location on either side, across the track of the Old Colony Railroad at grade at a "uniform width of fifty feet," and on January 21, 1874, the commissioners ordered that "leave be granted to lay out Pearce Street, as prayed for." The mayor and aldermen, on May 4, 1874, acting under this authority, proceeded to lay out the street across the railroad forty feet in width, at the same elevation as the then grade of the railroad on the easterly line, and on December 28, 1874, the common council concurred in such laying out by vote.

Within a year after the above proceedings, the city entered upon the street, paid the damages awarded to abutters, worked the street, and opened it to public travel to a width of forty feet up to the line of the location of the railroad on either side. The railroad company never admitted the validity of the laying out across its location, and refused to remove its fences from either side thereof, and in 1880 it set the fences upon the easterly side of its location several feet farther eastward upon the street, to

sion so to do. The commissioners shall cause due notice of the application to be given to the corporation owning the railroad; and after hearing the parties interested they may authorize the mayor and aldermen or selectmen so to lay out the way, and shall require it to be laid out and constructed in accordance with the provisions of the preceding section. They shall give special authority permitting it to be laid out upon a level with the railroad when in their opinion public necessity so requires.

"Section 60. A corporation whose road is crossed by a turnpike or other way on a level therewith, shall at its own expense so guard or protect its rails by plank, timber, or otherwise, as to secure a safe and easy passage across its road; and if in the opinion of the county commissioners any subsequent alteration of the turnpike or other way, or any additional safeguards are required at the crossing, they may order the corporation to establish the same as provided in section forty-eight."

the line of a location upon land taken by authority of the Legislature to widen its location for a double track. No proceedings were ever instituted to enforce the construction of the street across the location of the railroad under the alleged laying out, or to remove the obstruction caused by the fences.

For some time after the alleged laying out there was, by permission of the railroad company, more or less travel by foot passengers across the railroad premises, which was subsequently stopped by boarding up the openings in the fences through which foot passengers had passed.

In 1873 the railroad company ran twenty-eight trains daily over its road at this point, had two tracks, and carried about one hundred and fifty thousand tons of freight daily. At the time of the hearing, it had three tracks, ran about seventy-six trains, and carried about three hundred and forty thousand tons of freight daily at the same point.

The judge ruled that the order of the county commissioners, if valid, was a permission only to lay out the crossing at grade fifty feet wide; that a substantial departure from the terms of the permission would make the subsequent proceedings of the mayor and aldermen and city council void; and that the attempt to lay out the crossing forty feet wide was such a substantial departure.

J. M. Morton & J. H. Benton, Jr., for the plaintiff.

J. F. Jackson, for the defendants.

DEVENS, J. That there were certain irregularities and informalities in the proceedings of the board of mayor and aldermen in laying out Pearce Street across the railroad of the petitioner must be conceded. But the record of an inferior court or tribunal, not proceeding according to the course of the common law, cannot be impeached for mere informalities, either in an action of tort against one exercising authority under its order or decree, or by bill in equity to enjoin him from so doing. The writ of certiorari brings up the whole record, and this will not be granted on the petition of a party claiming to be injured, unless it shall be seen that substantial justice requires it. *Robbins v. Lexington*, 8 Cush. 292. *Locke v. Lexington*, 122 Mass. 290. *Foley v. Haverhill*, 144 Mass. 352. *Attorney General v. Northampton*, 143 Mass. 589.

Even if, in a limited sense, the error committed by such a tribunal may be said to affect its jurisdiction, as where notice of its proposed proceedings is defective, advantage of this can be taken by certiorari only. "The rule," it is said in *Foley v. Haverhill*, *ubi supra*, "seems to be somewhat analogous to another Massachusetts rule, that a domestic judgment cannot be impeached collaterally upon grounds which would be open on writ of error." The contention of the plaintiff is, that even if, in the case at bar, a petition for certiorari might have been brought, the report shows that the mayor and aldermen had absolutely no jurisdiction of the subject with which they undertook to deal; and that, whether their order could or could not have been dealt with upon certiorari, it was wholly void, and therefore it is entitled to an injunction forbidding the defendants to act thereunder.

The mayor and aldermen of Fall River, with the concurrence of the common council, had exclusive power to lay out streets and town ways within the city limits. By the Gen. Sts. c. 63, § 59, before such a way was laid out over a railway already constructed, an application to the county commissioners was necessary, who, after proper notice, might give permission so to do, where the way was to cross above the railroad, requiring it to be laid out and constructed according to the provisions of § 62. The county commissioners were entitled also to give special authority permitting the highway to be laid out upon a level with the railroad, when in their opinion public necessity should so demand.

A petition for the location of a way over the railroad was presented to the city council, and the mayor was subsequently authorized to petition the county commissioners to lay out Pearce Street, from North Main Street to Davol Street, fifty feet wide, and "to cross the track of the Old Colony Railroad at grade." This petition to the county commissioners was made, and, after due proceedings, it was ordered by the county commissioners that "leave be granted to lay out Pearce Street as prayed for." Acting under this authority, the mayor and aldermen proceeded to lay out Pearce Street across the railroad forty feet in width on the same grade, and in this laying out the common council concurred. The city entered upon the street, awarded damages

to the abutters, worked the street, and opened it to the public up to the location of the railroad on either side. The railroad corporation never admitted the validity of the laying out across its location, refused to remove its fences from either side of the location, and in 1880 set the fences on the easterly side thereof several feet farther eastward upon the street, to a line upon land subsequently taken by authority of the Legislature to widen its location.

The inquiry that was submitted to the county commissioners by the petition of the mayor was twofold: first, whether public necessity and convenience required that there should be any way across the railroad; and, secondly, if there was to be such crossing, whether it might be ordered to be made at grade. The plaintiff contends that the width of the way stated therein is an essential part of the petition, that the leave granted by the county commissioners was only to lay out a crossing at grade of fifty feet in width, and that the attempt to lay out one of forty feet in width was a substantial departure from the leave as granted, by reason of which the subsequent proceedings would be invalidated. If we assume, without so deciding, that the construction given by the plaintiff to the authority granted by the county commissioners is correct, and that the act done by the mayor and aldermen, in concurrence with the common council, in laying out Pearce Street forty feet only in width, was unauthorized, the question remains whether there was any remedy for the plaintiff, except by a petition for certiorari. Even if the act of the city authorities was wholly without their jurisdiction and void, it is clearly settled that certiorari would be an appropriate remedy. *Charlestown v. County Commissioners*, 3 Met. 202. *Boston & Maine Railroad v. Lawrence*, 2 Allen, 107. *Boston & Albany Railroad v. County Commissioners*, 116 Mass. 73.

It may be questioned if the proceedings of tribunals exercising judicial functions can be impeached upon grounds which are open under a writ of certiorari. *Barnes v. Springfield*, 4 Allen, 488. *Foley v. Haverhill*, 144 Mass. 352. Whether this be so or not, the laying out of the street across the plaintiff's location forty feet in width only was an act done by the board of mayor and aldermen and the common council in excess of their author-

ity, while dealing with a matter within their jurisdiction, rather than an act without jurisdiction and therefore wholly void. The office of a writ of certiorari is to correct the errors and restrain the excesses in the exercise of jurisdiction by inferior courts or officers acting judicially. *Locke v. Lexington*, 122 Mass. 290. It is not intended that their proceedings shall be attacked collaterally, which might often result in confusion and perhaps grave injustice, and careful provision has been made by legislation for the protection of the rights of all parties interested, when such proceedings are brought up for revision on certiorari. In such case this court, if it finds error therein, may not only quash the proceedings, but may order them to be amended, may enter such judgment as the inferior tribunal should have entered, or may direct it to proceed anew according to law. Gen. Sts. c. 145, § 9; Pub. Sts. c. 186, § 9. *Boston & Albany Railroad v. County Commissioners*, 116 Mass. 73.

The question of laying out a street at grade over the railroad location was a matter placed within the jurisdiction of the city authorities by the action of the county commissioners. They had received full power to locate such a street, if they determined that public convenience required it. If it was an error on their part in locating the way only forty feet in width, it was an error of detail in dealing with a subject legally confided to them. This error could have been corrected in some one of the modes adverted to. It did not require that their proceedings should be wholly set aside. The remedy of the plaintiff, therefore, was solely by a petition for certiorari.

The plaintiff also contends, that, even if the laying out was valid, or cannot be attacked in this proceeding, the defendants can have no right to enter upon its location and prepare the road for public travel across it, within the lines of the way as laid out, and alleges that the defendant city asserts the right to do this at such times and in such manner as it deems best. The plaintiff further contends, that it was the duty of the county commissioners to pass a definite order as to how, at what times, and by whom the work should be done. It therefore urges that it is entitled to an injunction forbidding the defendant city by its servants from entering upon its location for the purpose stated. The question thus presented was not passed upon by the presid-

ing judge, and, in the view that he took as to the invalidity of the laying out, it was not necessary that it should be. It may be necessary for us to deal with it, as the whole case is reported to us to make such order or decree as, upon the consideration of all the facts, equity may require. So far as this contention is concerned with the order of the county commissioners, if there was a deficiency therein, as the plaintiff urges, it was to be remedied by a petition for certiorari, or perhaps by an application to the county commissioners themselves, on the ground that it was not sufficiently explicit. But if the defendants could have no right to enter upon the plaintiff's location, and the permission to lay out the way across the plaintiff's railroad involved, and could involve, no right to enter upon the location of the plaintiff's railroad, there to prepare the way for public travel, and if the plaintiff was itself preparing its own railroad to be crossed by the highway, or was ready to do so, it may be that it would be entitled to the injunction prayed for.

As to the respective duties of the railroad company and the city authorities in the construction of a highway at grade, the case is governed by the Gen. Sts. c. 63, §§ 57-60, then in force. By § 57, the expenses of and incident to constructing and maintaining the road or way at such crossing shall be borne by the county, city, town, or corporation owning the same. The inference from this drawn by the plaintiff, that some one else is to do the work, as unless this were so it would be unnecessary to provide that the corporation liable should bear the expense, is quite too forced, especially when this section is connected with § 60, which provides that a railroad "corporation whose road is crossed by a turnpike or other way on a level therewith shall at its own expense so guard or protect its rails by plank, timber, or otherwise, as to secure a safe and easy passage across its road." The railroad corporation is further required to provide for any subsequent alteration of the way, or any additional safeguards which the county commissioners may afterwards order to be established.

In *Davis v. Leominster*, 1 Allen, 182, 184, it was held that the obligation of a town to make roads safe and convenient for travellers continues where such roads are crossed by railroads at grade, except so far as the necessary use of the crossing by the

railroad may prevent it, and subject to such specific directions as may be given by the county commissioners. In *Jones v. Waltham*, 4 Cush. 299, it was held that, if the town made the crossing safe and convenient, except so far as the construction and operation of the railroad rendered it impracticable without interfering therewith, it was not liable for an injury occurring thereon. In *Scanlan v. Boston*, 140 Mass. 84, which was decided under the Pub. Sts. c. 112, § 124, — which is the same in substance as the Gen. Sts. c. 63, § 60, — the railroad company had two lines of track eight feet apart. It was held that it was the duty of the railroad company to keep in repair, not only the space between the tracks, but that between the two lines of track, and that the city was not liable for an injury occurring by a defect in that part of the planking between the two lines of track.

The intention of the Legislature has been to impose upon the city, or other corporation authorized to maintain a way crossing a railroad at grade, the expense and the duty of maintaining the way up to the outer line of the railroad tracks, or so near their foundations as not to interfere with them, and upon the railroad between these outer lines. Cases may be suggested where it would not be easy to construct the way up to the outer lines of the railroad without some inconvenience to it, and by the statute the "ways shall be so made as not to obstruct or injure the railroad," (Gen. Sts. c. 63, § 58,) except, it must be presumed, so far as any way would necessarily have that effect. It was contemplated that, when the portion which each should construct and maintain was settled by law, and when no specific directions were given by the county commissioners, no difficulty would be experienced in constructing the entire crossing, with proper regard to the convenience of both the parties interested and the safety of the public. If differences did arise, and neither party sought from the county commissioners any specific directions, each was left to perform its own duty as it might, having regard to the rights of the other.

Assuming that the allegations of the bill, the order to the highway surveyor, Thurston, and the answer, are to be interpreted as showing that the defendant city proposes to enter on the location and construct the way across the whole of it, including that portion occupied by the tracks, the plaintiff is

not entitled to an injunction forbidding it. It is its own duty to prepare the way, so far as the space between its rails is concerned, "to secure a safe and easy passage across its road." This duty it refuses to perform, and the performance of it could be enforced by a proceeding for an injunction initiated by the defendant city. If, instead of commencing such a proceeding, the defendant city now proposes itself to do this work, whatever the inconvenience to the plaintiff may be, it has no right to ask that the defendants be restrained from doing it in any suitable and appropriate manner.

Bill dismissed.

JOHN L. BATCHELDER & another, petitioners.

Suffolk. March 29, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Will — Lapse of Legacy — Failure of Trust — Residuary Clause — Equity Practice and Pleading — Bill for Instructions — Personal Claim of Party Plaintiff.

A testator, after a legacy to his wife absolutely, devised and bequeathed "all the rest and residue of my estate, real, personal, or mixed," to two trustees for her benefit during her life, and, at her death, gave all of such estate to trustees, as follows: certain pecuniary legacies to persons named, and "all the rest and residue of said estate, to be divided among them equally, share and share alike, to my three sisters." The testator and his wife died at the same time in the wreck of a vessel. *Held*, that the legacy to the wife passed by the residuary clause.

The first legacies to be given under the residuary clause, after the death of the testator's wife, were gifts of money to each of her trustees "for the faithful performance of their trust." *Held*, that the gifts to the trustees failed with the trust.

The two executors of the will, who were also named as trustees for the wife, brought a petition in equity for instructions as to the disposition of the estate, and one of them appeared and asked to file an answer reciting his personal claim against it, but was not permitted to do so. *Held*, that he could not file the answer, but might present his claim at his own expense by counsel other than those who appeared for him as executor.

PETITION IN EQUITY, filed March 10, 1887, by John L. Batchelder and David O. Paige, executors of the will of Henry L. Batchelder, for instructions as to the disposition of certain

portions of the estate. Hearing before *Devens*, J., who reported the case for the consideration of the full court, so far as material, as follows.

The will, which was dated December 7, 1882, after absolute gifts to the testator's mother and to his wife's mother of \$1,000 each, and in the third clause of \$15,000 and other property real and personal to his wife, Alta L. Batchelder, contained in the fourth clause a bequest of \$30,000 to his executors, in trust, to invest the same in specified securities, and proceeded, so far as material, as follows :

"5. All the rest and residue of my estate, real, personal, or mixed, I give, devise, and bequeath to said John L. Batchelder and David O. Paige, to have and to hold to them and their successors, but in trust, nevertheless, to the uses and for the purposes as follows, to wit: to invest whatever there may be of personal estate in the same manner as directed in bequest of thirty thousand dollars as aforesaid, and pay the income thereof, together with the income from the investment of said thirty thousand dollars; also, the income derived from any and all my real estate which may come into their hands as trustees as aforesaid under this will, as often as once a month, of the net receipts from rents from real estate, and, as often at least as once in six months, of the net income from the whole estate, real, personal, or mixed, with a statement therewith to my wife, said Alta L. Batchelder, during and for the term of her natural life, deducting from the aforesaid gross income all necessary expenses and legal charges incident to the management of said estate, including all taxes thereon." Here followed a provision for keeping up the net income to a certain amount by sale of parts of the trust estate. "Full power and authority are hereby granted to said John L. Batchelder and David O. Paige, trustees as aforesaid, or to those who, for the time being, may hold the aforesaid property in trust, to sell any real estate that may come into their hands, should my said wife so desire to sell the same under this will, and convey the same by proper deed or deeds duly executed, and invest the proceeds of any such sale or sales in the same manner as hereinbefore directed.

"6. Upon the decease of my said wife, I hereby give, devise, and bequeath all of said estate so devised and bequeathed to

trustees as aforesaid as follows, to wit: five thousand dollars each to said John L. Batchelder and David O. Paige for the faithful performance of their trust." Here followed pecuniary legacies to persons named. "All the rest and residue of said estate, to be divided among them equally, share and share alike, to my three sisters. . . .

"9. I hereby nominate my wife, said Alta L. Batchelder, my brother, said John L. Batchelder, and said David O. Paige, to be the executors of this will; and I hereby request that they be not required to give sureties on their official bond; and I also request that my said trustees, John L. Batchelder and David O. Paige, be not required to give sureties on any trustee bond."

It was agreed that the testator and his wife died at one and the same time, in the wreck of the steamship City of Columbus, on January 18, 1884, on a voyage from Boston to Savannah.

The sisters of the testator contended that the provisions of the will for the benefit of the wife never took effect; that the bequest to the executors "for the faithful performance of their trust" also failed; and that all the estate remaining in the executors' hands passed to them under the residuary clause of the will.

Certain next of kin and heirs at law of the testator contended that the devise and bequest to the wife in the third clause of the will became intestate property, and were not covered by the residuary clause, but passed to the next of kin and heirs at law of the testator.

One of the executors, David O. Paige, appeared and asked permission to file an answer in his own right, in which he claimed the sum of \$5,000 as a legatee under the sixth clause of the will, but the judge refused to allow the answer to be filed, and reserved that question upon the report.

R. M. Morse, Jr., (M. Morton, Jr., with him,) for the petitioners.

A. Hemenway, for Paige.

J. Willard, (J. M. Olmstead with him,) for the next of kin and heirs at law.

E. T. Burley, for the sisters.

HOLMES, J. This is a bill for instructions, brought by the executors of the will of Henry L. Batchelder. It is agreed that the testator and his wife died at the same time, in the wreck of

the steamer City of Columbus, (see *Coye v. Leach*, 8 Met. 371, 375,) and the main question is whether a legacy of \$15,000 to the testator's wife passes under the residuary clause of the will. The residuary clause gives "all the rest and residue of my estate, real, personal, or mixed," to trustees for the testator's wife during her life, and at her death it gives "all of said estate so devised and bequeathed to trustees as aforesaid, as follows, to wit:" certain pecuniary legacies to persons named, and "all the rest and residue of said estate to be divided among them equally, share and share alike, to my three sisters."

It is argued, that the gifts in remainder are confined to the fund given to the trustees for the wife, and that that fund could not have included a distinct fund given to her out and out by an earlier clause of the will. We are not disposed to undervalue the force of this argument, considered as a critical interpretation of words having no established meaning or purpose. But in our day, at least, one settled and understood purpose of a general residuary clause is to prevent a partial intestacy. The testator knows that his specific intentions may fail, and it is partly on that account that he follows up his more particular provisions with a general drag-net. The words "the rest and residue of my estate" have acquired the meaning, not merely of the residue above that which the will purports to dispose of, but of the residue above what it does effectually dispose of in the event. It is immaterial that the will shows that the testator expected and intended a gift to go another way, and did not expect it to pass under the residuary clause, unless the will discloses a distinct intention that it should not pass as part of the residue, even if the specified intention fails. One of the very objects is to provide for unexpected, as well as for expected cases. It is for this reason that lapsed legacies and devises pass under a general residuary clause. *Thayer v. Wellington*, 9 Allen, 283. *Lovering v. Lovering*, 129 Mass. 97, 100.

When a residue is left to A. for life, with remainder to B. and C., you must consider B. and C., as well as A., in construing the scope of the gift. You must remember that what will be the residue is not certain at the time of the will, but depends upon the event. If A. dies before the testator, B. and C. will take at once. There seems to be no more reason why, because, if the

wife had taken, the \$15,000 would not have fallen into the residue, that fact should prevent its falling into the residue when she does not take, than there would be if the gift had been to a third person. It is true that the language and the machinery of the will before us are somewhat nicer than a simple gift of the residue to the wife for life, with remainder to the testator's sisters. But we think it would be straining the words used, to say that they expressed any clearer intent to exclude the \$15,000 from the residue in all events, than a simple gift to the wife for life with remainder over would have done. They do not express any intent one way or the other with regard to the \$15,000 specifically, and the mere fact that, if the whole will had taken effect, that sum would have gone under the third clause, is no more than is true whenever a legacy lapses.

In *In re Spooner's trust*, 2 Sim. (N. S.) 129, a testatrix having a power of appointment appointed to her children by name, and constituted one son her residuary legatee. Another son died without issue in the testatrix's lifetime, and it was held that no such contrary intention appeared in the will as to prevent the residuary legatee from taking the share of the deceased son, which it had been ineffectually attempted to appoint specially. In *Bernard v. Minshull*, Johnson, 276, a testatrix having a power of appointment recited it, expressed an intention to exercise it, and appointed to her husband, but requested him to make a disposition of a specified part to carry out her expressed wishes. This request failed, because the testatrix had failed to express her wishes. It was held, that the husband was entitled to the part which he was intended not to take under the appointment, by virtue of a gift to him of "all and singular other my property and estate." Here it was very plain that the testatrix did not contemplate any part of the appointed fund passing under the residuary clause, but the general intent of the residuary clause prevailed, and the Vice-Chancellor, Page Wood, observed, that a very strong case must be made in order to induce the court to arrive at the conclusion that the property was effectually excepted out of the operation of the residuary clause. He also said, "All you have to consider is, whether the property is excepted in order to take it away under all circumstances and for all purposes from the persons to whom the rest of the

property is given ; or whether it is excepted merely for the purpose of giving it to somebody else." Applying these criteria, — which seem to us not at all too strongly stated, — we are of opinion that the legacy of \$15,000 passes by the residuary clause. See also *Evans v. Jones*, 2 Coll. 516.

The first of the legacies which are given, as we have stated, by the residuary clause, after the death of the testator's wife, are gifts of \$5,000 each to the two trustees for the wife "for the faithful performance of their trust." The words used expressly make the faithful performance of the trust the consideration and the condition of the right to the legacies, and negative the supposition that the legacies are given unconditionally, as marks of personal regard. Even if we should go so far as to say that the gifts of \$5,000 are in addition to such ordinary compensation as might be allowed by the court, in view of the provision deducting from the gross income all necessary expenses and legal charges incident to the management of the estate, still it is clear that they are compensation, and conditioned as we have said. The trust has failed, and the legacies fail with it. *Kirkland v. Narramore*, 105 Mass. 31. *Barber v. Tebbitt*, 29 Ch. D. 893.

The case presents a question of practice. The executors who bring the bill are also the parties named as trustees, and as such have an interest in the question just discussed. Bills for instructions suggest the analogy of bills of interpleader, although the jurisdiction of the former has been referred to the statutory jurisdiction in cases of trusts. Pub. Sts. c. 151, § 2, cl. 2. *Treadwell v. Cordis*, 5 Gray, 341, 348. It was laid down in *Houghton v. Kendall*, 7 Allen, 72, that, considering the plaintiff's relation to the parties, and the fact that he cannot be allowed to charge the estate for the costs of an argument, he ought not to take any part in the discussion. Afterwards the court passed a rule that, in such bills, no counsel for the plaintiff shall appear, or be heard, or act for and in behalf of any or either of the defendants. 26th Chancery Rule, 136 Mass. 607. But however it may have come about, it is settled in this Commonwealth, by long established practice and by decision, that the scope of bills for instructions is wider than that of bills of interpleader. *Stevens v. Warren*, 101 Mass. 564. *Putnam v. Collamore*, 109

Mass. 509. Decrees repeatedly have been made upon bills disclosing and asserting upon their face an interest in the plaintiff; e. g. *Dane v. Walker*, 109 Mass. 179, 181; *Goddard v. May*, 109 Mass. 468; *Hooper v. Hooper*, 9 Cush. 122. Therefore the interest of the plaintiffs, apparent on the face of the bill, was not fatal to the jurisdiction, as it would be in a case of interpleader. Of course they could not file an answer to their own bill, nor did they need to do so. But in a case like the present, where no objection is made to the mode of proceeding, we see no mischief in their being allowed to present their personal claims, at their personal expense, by different counsel from those who appear for them in their official capacity as executors.

Decree accordingly.

CHARLES A. CUTTER *vs.* NATHANIEL HAMLEN.

HARRIET A. CUTTER *vs.* SAME.

ERNEST B. CUTTER *vs.* SAME.

GUY V. CUTTER *vs.* SAME.

ALICE E. CUTTER *vs.* SAME.

Suffolk. March 19, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Survival of Action for Deceit — Personal Injuries — Lease of Dwelling infected by Diphtheria — Contributory Negligence — Evidence.

An action for deceit in letting a dwelling-house infected with diphtheria, causing injuries to the person, survives by force of the Pub. Sts. c. 165, § 1.

At the trial of such an action there was evidence tending to show that the lessor knew that the child of a former tenant had died of diphtheria in the house, which subsequently was fumigated by and made satisfactory to the board of health; that he knew the drains to be in bad condition, as to which he misled the lessee by specific statements; and that the lessee did not know that there had been diphtheria in the house. There was also uncontradicted evidence that the lessee was warned at the time of the letting that the lessor was old, forgetful, and incapable, and that he was to deal only with the lessor's agent, as well as evidence which, it was contended, showed lack of due care on the part of the lessee. *Held*, that there was evidence for the jury that the lessor knew or ought to have known that there was special danger of infection from the drains, which he was bound to disclose to the lessee, and which he

was not warranted in assuming to be removed by the doings of the board of health; and that the question of the lessee's contributory negligence was also for the jury.

Evidence of the condition of the drains, when they were repaired seven months after the lessee took possession, coupled with evidence of what had been done in the mean time, was *held* admissible to show their condition at the time the lease was made.

HOLMES, J. The first case is an action in two counts, the first of which alleges, in substance, that, to induce the plaintiff to hire a house, the defendant falsely represented that the drains, etc. were in perfect order, and that "the house was sweet and healthy"; that the plaintiff was induced by these representations to hire, and did hire, the house; that the drains were in bad condition, and the house was unhealthy and infected with diphtheria, all of which the defendant knew; and that the plaintiff, by using the house, was made sick with diphtheria, unable to pursue any business, and helpless for life. It also alleges the illness, and the plaintiff's consequent loss of services, of other members of the plaintiff's family, and the death of his son. The second count alleges the dangerous condition of the house, and that the defendant, to induce the plaintiff to occupy the house, well knowing the facts alleged, negligently omitted to inform the plaintiff, or to take any due precaution against the exposure of the plaintiff to the disease, and concealed defendant's knowledge of the same. Then follow allegations of the plaintiff's ignorance, use of due care, entry into the house induced by the defendant, and illness in consequence. The other four cases are actions brought by the wife and children respectively of the plaintiff in the first case, the declarations in which contained in substance the same allegations. The defendant died after the trial, and his executor appeared specially, and moved to dismiss the first case, on the ground that it did not survive. The motion was overruled, and the executor excepted.

If we assume, as is argued on behalf of the executor, that both counts of the declaration are counts in deceit, it does not follow that the action will not survive. It is settled in this Commonwealth, that the provisions of the Pub. Sts. c. 165, § 1, that actions for "damage done to real or personal estate" shall survive, does not apply to mere impoverishing of a man's estate

generally, but requires that damage to some specific property should be alleged and proved. *Read v. Hatch*, 19 Pick. 47. *Leggate v. Moulton*, 115 Mass. 552. In England a more liberal rule seems to have been established. *Twycross v. Grant*, 4 C. P. D. 40. But *Leggate v. Moulton* implies, as plainly as the English cases decide, that an action for injury to specific property—and by the same reasoning under our statute an action for injury to the person—will survive as well when the wrong is brought to pass by fraud as when it is done by force. See *Hatchard v. Mège*, 18 Q. B. D. 771; *Oakey v. Dalton*, 35 Ch. D. 700.

In such cases the action is not for the deceit alone, the naked *injuria*, but for the damage caused by the deceit. The nature of the damage sued for, not the nature of its cause, determines whether the action survives.

In *Norton v. Sewall*, 106 Mass. 143, an action was held to survive to an administratrix for personal injuries to her intestate, caused by a dose of poison given by a third person, to whom the defendant negligently sold the poison as a harmless medicine. Plainly, so far as the present question goes, the defendant in that case would have stood no better if he had committed an intentional fraud. Plainly, too, the connection between the cause and the effect, if that had anything to do with the question, is at least as close in the present case as in *Norton v. Sewall*.

It is true that it was held in *Cutting v. Tower*, 14 Gray, 183, that an action for deceit in selling poisoned grain, whereby the purchaser's horses were killed, did not survive to his administrator. It might perhaps be argued, that, although inducing the plaintiff to use the horse would have been a substantive tort but for the intervention of a contractual relation between him and the testator through the lease, that relation reduced the tort to a mere incident of the fraud in making the contract, and that this view would reconcile *Cutting v. Tower* with *Norton v. Sewall*. We do not understand the explanation of *Cutting v. Tower*, offered in *Norton v. Sewall*, to turn on the fact that the fraud was incident to a sale, but on the ground that the damage to the plaintiff's horses by eating the poisoned meal sold him was alleged only by way of aggravation of the damage claimed for

fraud in the sale. It is unnecessary to inquire whether we should have construed the declaration in *Cutting v. Tower* the same way. It is enough to say, that whether the statute touching the survival of actions is to be construed strictly, as is said in *Cutting v. Tower*, or very liberally as the English statutes have been construed, (*Twycross v. Grant*, 4 C. P. D. 40, 45,) we are to look at the substance of the matter. See *Pulling v. Great Eastern Railway*, 9 Q. B. D. 110. The substance of the complaint for damages caused the plaintiff's person by fraud is the same when the trap is baited with a lease, as when he is led into it by a simple invitation. Nor is it plain why the wrong to the person should be reduced to an incident of the other tort, merely because the latter is one of the steps by which the former is accomplished.

We come now to the case presented by the evidence. The ground mainly relied on is, that, eight months before the plaintiff in the first case took the house, and with his family entered into occupation of it, the child of a former tenant died there of diphtheria, and that this fact was not disclosed to the plaintiff. We cannot say that there was no evidence that the landlord knew of the death, but we are disposed to assume that he also knew that soon after the death the house was fumigated under the direction of the board of health, and that the measures usually taken in such cases were taken, and that one of the inspectors had indorsed "O. K." on a report concerning the premises, which was explained in evidence to mean that the premises had been made in all respects satisfactory to the board of health. If the case stopped there, we should be of opinion that the landlord was justified in assuming that the house had been disinfected, and that the requirements of *Minor v. Sharon*, 112 Mass. 477, were satisfied. It is settled that a landlord may be liable for not disclosing a concealed source of danger, known by him to be such, and not discoverable by the tenant. *Minor v. Sharon*, *ubi supra*. *Cowen v. Sunderland*, 145 Mass. 363. But it is not enough that the landlord knows of the source of danger, unless also he knows, or common experience shows, that it is dangerous. He is bound at his peril to know the teachings of common experience, but he is not bound to foresee results of which common experience would not warn him, and which only a specialist

would apprehend. *Bowe v. Hunking*, 135 Mass. 380. *Commonwealth v. Pierce*, 138 Mass. 165, 179.

There was evidence that the condition of the drains was known by the landlord to be bad. If this evidence, again, stood alone, we should have great difficulty in saying that there was anything to go to the jury. The general rule between landlord and tenant, as well as between buyer and seller, is *caveat emptor*. *Bowe v. Hunking*, *ubi supra*. And this rule cannot be eluded by showing that the tenant did not know of a defect, that the landlord did, and then asking a jury to pronounce it a secret source of danger. Everybody knows that houses in a city have drains, and that drains are liable to get out of order, or to prove unsatisfactory. The possibility is manifest, and there is strong ground for requiring the tenant to insist on a warranty, if he does not wish to take the risk.

But when we put together the facts that there had been diphtheria in the house, and that the drains were defective, we can hardly say that the jury might not have been warranted in finding that the defendant knew, or ought to have known, as a prudent man, that this combination of circumstances introduced a special danger of infection from the drains, and that he was not warranted in assuming that this peculiar danger was removed by what the board of health had done. Moreover, there was some evidence that the plaintiff was misled by specific statements as to the condition of the drainage. In view of the uncontradicted testimony, that the plaintiff was warned that the landlord was old, forgetful, and incapable, and that the plaintiff was not to deal with him but with his son, we hardly can think that the charge of fraud was persisted in, but we cannot say that the plaintiff was not entitled to argue it if he saw fit. The request for a ruling that there was no evidence for the jury must be taken to refer to the effect of the evidence actually put in, irrespective of the pleadings. As the judge who heard the evidence thought that the plaintiff ought to be allowed to go to the jury, we cannot say that he was wrong.

The question whether the plaintiff was guilty of contributory negligence was for the jury. The evidence was that he did not know of the diphtheria having been in the house, and the jury may have found that that was what made the drains dangerous.

Evidence of the condition of the drains, in respect of traps, etc., when they were repaired some months after the plaintiff's taking possession, when coupled with evidence of what had been done in the mean time, was admissible to show their condition at the time when the lease was made. *Brooks v. Petersham*, 16 Gray, 181. *Exceptions overruled.*

L. S. Dabney & F. Rackemann, for the defendant and his executor.

S. J. Thomas & M. O. Adams, for the plaintiffs.

EUGENE L. KENYON vs. JOHN J. WRISLEY.

Hampden. September 25, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Bankrupt — Promissory Note — Assignee — Statute of Limitations.

A bankrupt, upon the assignment of his estate in 1878, did not include in his schedule of assets a promissory note then due him, thinking it worthless. The assignee had no knowledge of the note until 1887, when he declined to attempt its collection, but consented to the bankrupt's bringing an action thereon in his own name and for his own benefit. *Held*, that the action was barred by the U. S. Rev. Sts. § 5057, limiting actions by assignees in bankruptcy.

CONTRACT upon a promissory note, dated November 16, 1867, payable two months from date to the order of the plaintiff, and signed by the defendant. Writ dated December 5, 1887.

Trial in the Superior Court, without a jury, before *Dewey, J.*, who found for the defendant, and reported the case for the determination of this court. If the finding was correct, judgment was to be entered thereon; otherwise, for the plaintiff. The facts appear in the opinion.

L. White, (*E. S. White*, of Connecticut, with him,) for the plaintiff.

E. P. Kendrick, (*G. Wells* with him,) for the defendant.

W. ALLEN, J. The note was made in Connecticut, where the parties resided, and became due in 1868. The defendant

resided in New Hampshire from 1869 to 1887, and has since resided in this Commonwealth. The plaintiff was adjudicated a bankrupt in the United States District Court for the district of Connecticut, and an assignment of his estate was made in 1878. The plaintiff has not received his discharge, and the proceedings in bankruptcy are still pending. The assignee has never sold or assigned the note. The plaintiff considered the note worthless, and did not include it in his schedule, and the assignee had no knowledge of its existence until informed by the plaintiff, in 1887. The assignee then declined to attempt the collection of the note for the benefit of the estate, but gave his consent to the bringing of this suit upon it by the plaintiff in his own name, and for his own benefit.

The plaintiff is the payee of the note, and the action, whether brought by the assignee or by the plaintiff, will lie in his name, as well as in the name of the assignee. *Mayhew v. Pentecost*, 129 Mass. 332. If brought by the assignee, it would be barred by the statute of limitations. U. S. Rev. Sts. § 5057. *Jenkins v. International Bank*, 106 U. S. 571. *Ross v. Wilcox*, 134 Mass. 21, and cases cited. There was no fraud or concealment by the defendant that would prevent the operation of the statute.

The assignment in bankruptcy vested the legal title to the note, as well as the beneficial interest in it, in the assignee, and the plaintiff could possess a right to maintain an action upon it for his own benefit only by a transfer of the note to him by the assignee, or by the consent of the assignee to the action. There has been no sale or assignment of the note by the assignee, and so the objection that a purchaser from the assignee, after the disability of the statute of limitations had attached, would take subject to that disability, does not arise. The plaintiff contends that the suit is brought for his benefit, with the knowledge and consent of the assignee; that his right is good against all the world but the assignee, and, the assignee not objecting, the defendant cannot question the plaintiff's right to maintain the action; that the assignee has a right to abandon the claim; and that, having elected not to take it under the assignment, it belongs to the plaintiff as if there had been no assignment.

The fatal objection to this contention, in whatever form it may be stated, is that the assignee did not elect to abandon the claim,

and did not consent to a suit upon it by the plaintiff, and did not act in regard to it until after his right of action was barred by the statute. After the assignment, and until some act of the assignee, the plaintiff held the note merely as his depositary, and did not have such possession of the note that he could have maintained an action upon it. *Gay v. Kingsley*, 11 Allen, 345. The fact of the assignment could be shown to defeat an action by the plaintiff. The assignee might come in and prosecute the action for his own benefit, or it might perhaps be shown that he had authorized the suit for the benefit of the plaintiff, either by evidence of his election to abandon the claim to the plaintiff, or of authority from him to bring the suit, or by his neglect to come in and prosecute when summoned by the court. But if it did not in some way affirmatively appear that the suit was authorized by the assignee, it could not be maintained. *Smith v. Chandler*, 3 Gray, 392. *Jones v. Dexter*, 125 Mass. 469.

In this case it appears that the assignee did not elect to abandon the claim, and did not authorize a suit upon it, until after his right of action was barred. While he alone had the right of action upon the note, the right was barred by the statute; it could not be revived by his subsequent abandonment of his right, or consent to an action. If he were summoned in, he could not prosecute or authorize the prosecution of the action against the defence of the statute of limitations. He could neither sell the claim, nor authorize nor consent to a suit upon it except subject to the defence of the statute. See *Gifford v. Helms*, 98 U. S. 248; *Wisner v. Brown*, 122 U. S. 214; *Cleveland v. Boerum*, 24 N. Y. 613; *Moses v. St. Paul*, 67 Ala. 168; *Buckingham v. Buckingham*, 36 Ohio St. 68, 77.

Judgment on the finding for the defendant.

TIMOTHY A. SMITH vs. CHRISTOPHER WHITNEY.

Worcester. October 1, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Lease of Land — Removal of Building at end of Term — Trade Fixtures.

A lease of land provided that the lessee might make additions and alterations in a wooden building thereon, which were to enure to the benefit of the premises at its expiration, and that he might erect other buildings on it for manufacturing purposes and remove them within a limit thereafter. The lessee altered and enlarged the wooden building and fitted it with machinery for a box factory, and erected near it a brick engine-house, complete in itself and wholly unconnected therewith, except that a tin flashing attached to the side of the wooden building was fitted closely to the roof of the engine-house to protect it from the weather. The engine and boiler were placed on solid foundations of masonry, the boiler was connected with an iron smoke stack running through the roof, and the engine was coupled with the machinery by belting and shafting. *Held*, that the engine-house was not an addition to the wooden building, but a building which the lessee had a right to remove, and that the boiler and engine, as well as the machinery, were removable trade fixtures.

CONTRACT to recover for breach of the covenants of a written lease of land, given by the plaintiff to the defendant, of which the following clauses alone are material:

“And it is further agreed that the said lessee may erect at his own expense any buildings which he may deem necessary for storehouses, or for manufacturing purposes, and shall have the right to remove the same at any time within three months after the expiration of this lease: provided such removal shall be made without damage to the property of said lessor.

“And it is further agreed that the said lessee may change the location of the lumber-house now on the premises, and make such alterations and additions to the same as said lessee may deem desirable: provided such additions shall be made wholly at the expense of said lessee, and provided also that such alterations or additions shall enure to the benefit of said premises at the expiration of this lease.”

At the trial in the Superior Court, before *Aldrich, J.*, evidence was introduced tending to prove the following facts.

At the beginning of the term, when the defendant took possession of the demised premises, the lumber-house referred to in

the lease was a rectangular wooden building, one story high, with shingled roof, and covered with unmatched boards, its dimensions being sixty by thirty feet. There was no floor on the lower story, but a flooring above, forming an attic. Soon afterwards the defendant moved the lumber-house to another location on the leased premises, and extensively altered and enlarged the building, putting into it saws, planes, and other machinery for the manufacture of wooden boxes, and shafting and pulleys to run such machinery by steam power. At the same time he erected a brick building, twenty-three feet long and sixteen feet wide, at one end of the lumber-house, upon a stone foundation wholly unconnected with the foundations of the lumber-house. Each of the four brick walls was eight inches thick and nine feet high, and that next to the lumber-house was placed about three inches from its adjacent side, which in the enlargement was not clapboarded for the space covered by the wall. The brick building was covered by a tin and wooden roof with the gable end next to the lumber-house, and the tin and boards of the roof touched that side of the lumber-house, but neither the tin nor the boards were fastened to it. A tin flashing, or strip of tin ten or twelve inches wide, was nailed on to that side of the lumber-house, one edge thereof under the clapboards, in such a position as to conform to the line where the surface of the tin roof came in contact with it. The other edge of such flashing was bent out at right angles to the side of the lumber-house, and extended some six or eight inches out over the tin covering of the brick building, and fitted down as closely as possible to it, so as to exclude the water, but was not soldered or otherwise fastened. A doorway, in which a door was hung, was left in the brick wall next to the lumber-house, and a corresponding doorway was cut through the side of the lumber-house, as the means of passage between them. There was another outside door in the brick building, not connected with the lumber-house.

In the brick building were placed a boiler and steam-engine, both being placed on stone or brick foundations, set in the ground, the boiler being connected with an iron smoke stack extending through the roof. By means of belting passing through the brick wall next to the lumber-house, and attached to a shaft running under the sill of the latter and affixed to it

by a hanger, and by means of other pulleys and shafting, power was communicated to the machinery in the lumber-house. The brick building and the boiler and engine were used solely in connection with, and for furnishing the power to run, the machinery in the enlarged lumber-house, and there was no other power on the premises. Within the term, the defendant ceased to use the lumber-house as a box factory, and took out the machinery and took down and carried away the brick building and the boiler and engine. In doing so he left the tin flashing on the side of the lumber-house, and it so remained at the end of the term.

The defendant testified that the brick building to contain the boiler and engine to operate the machinery was a part of his plan to change the lumber-house into a box factory, that he made no other provision for power, and that he intended not to connect said brick building with said lumber-house. The plaintiff testified that he drew the lease himself, and at the time supposed some manufacturing business was to be commenced there, and that he understood machinery was going to be run, and contended that the brick building and the engine and boiler belonged to him under the terms of the lease, but did not contend that any unnecessary injury was done to the lumber-house in removing the brick building, or that any injury was done to it except in taking it away.

The judge ruled that the defendant had the right to remove the building and the boiler and engine. The jury returned a verdict for the plaintiff upon another issue; and the plaintiff alleged exceptions to the above ruling.

F. P. Goulding, for the plaintiff.

W. S. B. Hopkins, (*W. T. Forbes* with him,) for the defendant.

W. ALLEN, J. We are of opinion that the engine-house was not an addition to the lumber-house, but a building which the defendant had a right under the lease to remove. The lumber-house was a wooden building, and extensive alterations and additions were made to it, and it was fitted with machinery for a box factory. The building in question was erected near to it, and was not, in its construction or in its use, a part of it. It was built of brick, complete in itself, and was not connected

with the other building. Its only use was as a house for the engine which furnished power to the factory, and which was connected with the machinery in the factory by belts and shafting. The engine and machinery were trade fixtures, which could be removed by the defendant. The fact that the engine was so connected with the machinery in the factory did not make the engine-house a part of the factory building. On the contrary, the purpose of its erection, for the protection of a fixture which could be removed as personal property of the defendant, as well as the manner of its construction, shows that it was not an addition to the lumber-house, but a building which the defendant could remove before or after he should remove the engine.

Exceptions overruled.

JAMES F. KENDALL vs. GEORGE E. KENDALL.

Worcester. October 1, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Personal Injuries — Collision between Foot Traveller and Sleigh — Due Care.

At the trial of an action for personal injuries sustained by the plaintiff in colliding with a horse and sleigh, there was evidence that there was about a foot of snow on the ground; that a way for teams had been broken out, the plough leaving outside of the beaten track a path about eight inches wide; that, as he was walking on the extreme right of this path, the horse and sleigh came along from the opposite direction at great speed, and, as the driver did not turn out, the shafts of the sleigh, which projected sidewise, struck and injured the plaintiff. On cross-examination, he would not admit that he kept in the path in the assertion of a supposed right to do so, and knowing that the sleigh had such shafts, but testified that, although the driver and himself were not on good terms, he did "just the same as I should with anybody else." *Held*, that the question of due care on his part was properly submitted to the jury.

TORT for personal injuries sustained by the plaintiff while travelling on foot in the highway, in a collision with a horse and sleigh, driven by the defendant. Trial in the Superior Court, before *Barker, J.*, who, after a verdict for the plaintiff, allowed a bill of exceptions, the material part of which appears in the opinion.

J. W. Corcoran & H. Parker, for the defendant.

A. Norcross & H. C. Hartwell, (*C. F. Baker* with them,) for the plaintiff.

MORTON, C. J. The question whether the plaintiff was in the exercise of due care at the time of his injury was properly submitted to the jury, and whether it was properly so submitted is the only question raised by this bill of exceptions. It appeared from the evidence, that at the time of the accident there was about a foot of snow upon the ground; that a way for teams had been broken out in the road, there being two tracks or ruts where the horses travelled and the runners of sleighs went, and also another track about eight inches wide, outside of the beaten track, made by the plough in breaking out the road; that the plaintiff was travelling on foot on the extreme right of the beaten way in the last-named track; that the defendant was coming from the opposite direction and driving in a sleigh at great speed; that he did not turn out, and the projecting shafts of his sleigh struck the plaintiff.

The mere fact that the plaintiff did not step out of the track into the snow, is not conclusive evidence of negligence. It was for the jury to say whether he might reasonably expect that the defendant would slacken his speed and turn to the right, so that they might pass each other in safety. The defendant cross-examined the plaintiff at length, in the attempt to show that he stubbornly and recklessly kept in the travelled path, in the assertion of a supposed right to do this, knowing that the defendant had a sleigh with projecting shafts, and thus voluntarily brought the injury upon himself. But it cannot be held, as matter of law, that the evidence proves this. The plaintiff did not admit it, but testified that, although he and the defendant were not on good terms, he did "just the same as I should with anybody else." It was for the jury, who saw the witnesses, and who alone have the right to judge of their credibility, to say, upon all the evidence, whether the plaintiff was in the exercise of such care as a reasonably prudent and cautious man would exercise under the same circumstances. It was a question of fact, and not of law.

Exceptions overruled.

PATRICK J. SCANLON vs. BOSTON AND ALBANY RAILROAD
COMPANY.

Worcester. October 2, 1888. — October 19, 1888.

Present : MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Personal Injuries — Master and Servant — Risk incident to Employment of
Railroad Brakeman.*

A brakeman on a railroad, while climbing up a ladder on the side of a freight car, was injured by colliding with a signal post outside of the track and three feet and a half from it, and but one foot from the ladder, there being but few such structures on the line of the road so near the track. It was his first trip as a brakeman, and he was unfamiliar with the road and with the running of trains, and he was not cautioned or informed of such a danger, and he had no reason to know that there were permanent structures so near the tracks as to make it dangerous for him to be in such a place. *Held*, in an action to recover for such injuries, that the risk was not so obviously incident to the employment that he could be said to have assumed the risk thereof, and that the action could be maintained.

TORT for personal injuries received by the plaintiff while in the defendant's employment as a brakeman. Trial in the Superior Court, before *Dewey, J.*, who ordered a verdict for the defendant, and reported the case for the determination of this court, as follows.

The plaintiff, after having been sent to Boston the previous Saturday for an examination as to color blindness, entered into the employment of the defendant on the day of the accident, which took place on Monday, February 7, 1887. He was on that day put as a brakeman upon a local freight train, which ran from Worcester to Boston. He testified that he might have been over the road before six times in all, during several years, as a passenger; that he had previously been in the employment of the city of Worcester, in the sewer department, for several years; and that he had, at an earlier period, when he first came to this country, been in a freight depot in Boston, on the Boston and Maine Railroad, as a freight handler.

The evidence introduced tended to show, that, when the train reached Cottage Farm Station, it was running at the rate of about fifteen miles an hour; that the plaintiff, with the brakeman of the head car, was on the tender of the engine, the

plaintiff having gone there to learn from that brakeman what might be wanted of him; that the brakeman of the head car had just got down on to the moulding on the after end of the tender to draw the coupling-pin to disconnect the engine from the train; that the plaintiff got down upon the moulding of the tender, apparently to help, whereupon the brakeman of the head car told him to get up again, because he was going to let off the train; that the plaintiff, in order that he might mount the head car, swung himself on to the ladder, which was on the outside of the car, instead of being upon the end of the car next to the tender, so that in climbing the ladder the plaintiff was upon the south side of the head car; that he was struck by a signal post and knocked from the car, receiving the injuries; that the signal post was about ten inches square, and had on its top a round signal box, intended to display signals to engineers of any obstruction upon the track; that at the point where the signal post stood, there were four tracks running into Boston; that the train on which the plaintiff was a brakeman was upon the second track from the north, being the main east-bound track; that the signal post was placed between the south rail and north rail respectively of the second and third tracks from the north, as near as could be half-way between them; that the distance from the south rail of the track on which the train was moving to the signal post was three feet and a half; that the height of the post and shoulder on which the signal box rested was nearly fifteen feet; and that the car, including the ladder, projected two feet and a half beyond the south rail, and that the height of the car from the rail was twelve to thirteen feet.

The plaintiff testified, that he had no knowledge whatever of the height of this post; that he had no knowledge of the proximity of this, or other objects, to the track; that he had no directions given him at all, by any person, in regard to the car, or obstructions on the road, or in regard to his duties on the train, other than as it was a local freight train he found that he was wanted anywhere it might be convenient upon the train in the switching, and that when he had once been on the tender before, on returning to the train, he was told to keep near the brakeman of the head car and he would find what to do; and that when he mounted the ladder he looked forward to see if

there was anything in his way, but that the smoke from the engine prevented his seeing.

The electrical engineer of the defendant testified that the road at this point was on a curve, and that the curve was such that, as the train moved in an easterly direction, its south side would be on the outside of the curve, and this signal post could be seen but a short distance. There was no evidence, on the part of the defendant, contradicting the testimony of the plaintiff, that he was given no directions other than those stated above.

The defendant called witnesses to show that an examination had been made on its railroad for fifteen miles west of Boston, including the neighborhood of the Cottage Farm Station, which is some three or four miles from Boston; that an examination of the permanent structures and buildings on the tracks of the road disclosed that seven structures in that fifteen miles were as near the track as this post, two of them being signal posts, next to this one in succession, and between the tracks, where the road was a four-track road; that the other objects were bridges, abutments, and a telegraph pole; that these signal posts were, in most cases, placed at a greater distance from the track, but the electrical engineer of the company testified that at this place there was no easily practicable position in which this signal could have been placed for the purpose for which it was intended, other than the position in which it was placed, which was to warn the engineer, coming from Boston on the third track from the north, of any train standing at Cottage Farm Station, and was therefore placed upon the right of this track.

The defendant asked the judge to rule that the plaintiff could not recover, as the danger to which he had been exposed and which had caused him his injuries was incident to the employment he had taken upon himself; that there were no facts, special to the case, to take it out of the rule; and that the dangers incident to the employment defeated the recovery by an employee; and the judge, against the plaintiff's objection, so ruled, and directed a verdict for the defendant. If the ruling was right, judgment was to be entered on the verdict; otherwise, a new trial was to be granted.

F. P. Goulding, for the defendant.

W. S. B. Hopkins, for the plaintiff.

W. ALLEN, J. The danger, the risk of injury, which it is claimed that the plaintiff assumed, was not the particular danger from the post which caused the injury, but the general danger from the structures and erections near the track. The plaintiff had no actual knowledge of the danger, and he cannot be held to have assumed the risk of it unless the character of the danger and the circumstances are such as to show that he ought to have known and appreciated it. The fact that it was incident to the employment is not sufficient; peril from dangerous machinery or appliances or structures is incident to employment upon them, but the risk is not assumed by the employee unless he knows the danger, or unless it is so obviously incident that he will be presumed to know it. The danger in this case was not from objects casually or accidentally near the side of the car, but from permanent erections maintained near the track by the defendant. The circumstances are not such that the plaintiff will be presumed to, or ought to, have known of the danger. He did not know that there were erections so near the track as to endanger him. Such erections were, in fact, few and exceptional. Within fifteen miles of Boston there were but seven, three signal posts, one telegraph pole, and three bridges and abutments; it does not appear whether there were any others upon the road. It was the plaintiff's first trip as brakeman; he was unfamiliar with the road and with the running of trains, and was not informed that there was any such danger, or in any way cautioned in regard to it; and he had no reason to know that there were permanent erections so near the tracks as to make it dangerous for him to be upon the place on the car which was provided by the defendant.

The case of *Lovejoy v. Boston & Lowell Railroad*, 125 Mass. 79, was in some respects very similar to this. An engineer, leaning out from the cab of his engine, was struck by a signal post. The post was one of a series equally distant from the track; the abutments of forty-six bridges, and numerous buildings, station entrances, and other structures on the line of the railroad, were as near to the track, and these facts were known to the plaintiff. The court say: "If there was any danger to the plaintiff, while in the performance of his duty, from the structures thus placed, it was a risk he had assumed. He knew the manner in which the road was constructed, the proximity

to the track of these structures, and the methods employed in the management of the trains. The defendant had the right to construct its road and conduct its business in this manner, and, as was said in *Ladd v. New Bedford Railroad*, 119 Mass. 412, is not liable to one of its servants, who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom."

In *Yeaton v. Boston & Lowell Railroad*, 135 Mass. 418, the plaintiff was employed upon a switching engine, which was used to move cars about the defendant's yard, and part of the plaintiff's business was to move damaged cars, and he knew the danger that attended handling them, and sometimes examined cars to see if they were damaged. The court held, that the defendant was not bound to give notice to the plaintiff that a particular car which was in the yard to be moved was defective, but that the plaintiff took the risk of ascertaining that fact.

In the case at bar, it was the general danger from permanent structures of which the defendant failed to give notice.

Leary v. Boston & Albany Railroad, 139 Mass. 580, was the case of a fireman upon a switching engine, who was standing upon the footboard of the engine, and was thrown off by the jolting of the engine in crossing frogs and switches. It was held, that the plaintiff had full knowledge of the danger, and assumed the risk, and that the defendant was not in fault. In *Ferren v. Old Colony Railroad*, 143 Mass. 197, the plaintiff was injured by being pressed between a car, which he was pushing, and a building. He knew the position of the building and of the car, but did not appreciate the peril. The court say: "The material point of distinction between this case and many others is, that here it is open to the jury to find that the plaintiff did not know or appreciate the risk of the work upon which he was engaged, and that in the exercise of due care he was not, as matter of law, bound to know or appreciate the same."

In the case at bar, we think that the danger was not so obviously incident to the employment that the plaintiff can be held to have assumed the risk of injury from it, and that it cannot be said, as matter of law, that he was bound to know and appreciate the danger.

New trial granted.

WILLIAM N. WALKER, administrator, vs. ALMIRA J. FULLER.

Worcester. October 2, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Probate Appeal — License to sell Real Estate — Determination of Title.

On an appeal, by one only of persons interested in real estate, from a decree of the Probate Court granting a license to sell it, the question of title, except so far as any doubt regarding it may affect the expediency of the sale, is not properly before the court, and, if there is no waiver of the objection, cannot be determined.

APPEAL by Almira J. Fuller, one of the children of Almira B. Brooks, from a decree of the Probate Court licensing the administrator of the latter's estate to sell the whole of her real estate, because a partial sale would greatly injure the residue.

The appellant filed the following reasons of appeal: "First. The real estate which the petitioner seeks to sell was not at the time of the death of said Almira B. Brooks the property of said Brooks, and the administrator of her said estate had no right or interest in the same. Second. Because the said property and real estate which the administrator seeks to sell is now the property of the appellant. Third. Because the decree is not in accordance with the law and decisions of this Commonwealth."

At the hearing, before *Devens*, J., the following facts appeared. Oliver Greenwood died in 1849, leaving a widow, Phebe Greenwood. His will, which was duly proved and allowed, contained the following clauses:

"I give to my daughter, Almira B. Brooks, the small house near my dwelling-house, with the land under and around the same, to the amount of one acre, to be laid out for the best accommodation of the house with the least injury to the remainder of the farm, to have and to hold the same to her and to her heirs forever.

"I give to my beloved wife, Phebe Greenwood, the use and improvement of all the residue and remainder of my estate, whether real, personal, or mixed, during her natural life, and, if the income shall be insufficient for her comfortable support, the deficiency shall be made up from the sale of the property,

or such part thereof as may be necessary for that purpose, and I hereby authorize my executor hereinafter named to sell and convey at public or private sale the whole or any part of my real estate with the consent of my said wife. And in case my real estate shall be sold as above, I order the proceeds of the sale to be placed in the hands of a trustee or trustees, to be appointed by the judge of probate, the proceeds aforesaid to be applied first for the comfortable support of the said Phebe Greenwood during her life, and after her decease the remainder, if any, to be applied to the support and maintenance of my daughter, Almira B. Brooks, and her children, and at the decease of said Almira the remainder, if any, to be divided equally among her children, said trustee to use a wise discretion in the expenditure, always behaving reasonably in the premises."

None of the real estate thus devised was ever sold during the lifetime of either Phebe Greenwood or Almira B. Brooks. After the death of Phebe, all the real estate of Oliver Greenwood remained in the possession and enjoyment of Almira B. Brooks, who was the only child of Oliver and also of Phebe Greenwood, until her decease in 1886. The license to sell covered the real estate devised by the will of Oliver Greenwood. The validity of the decree was not questioned, so far as it related to the property to be devised by the first clause of the will, but only to that devised by the second clause. The appellant contended that under said will the real estate described in the petition of the administrator passed to the children of Almira B. Brooks immediately upon her death; that therefore the administrator had no right or interest in said real estate, and that it could not be sold to pay the debts of the estate of said Almira B. Brooks. The appellee contended that said real estate passed to Almira B. Brooks in fee, as the heir at law of Oliver Greenwood, at the decease of Phebe Greenwood.

The judge was of opinion that the question of the title to the real estate was not properly before the court, but, if it was, that the title thereof vested absolutely in Almira B. Brooks upon the death of Phebe Greenwood, and that the decree of the Probate Court should be affirmed, and the case remanded for further proceedings; and reported the case for the consideration of the full court.

J. R. Thayer & A. P. Rugg, for the appellant.

C. L. Simmons, for the appellee.

C. ALLEN, J. The administrator contends, in the first place, that the question of the title to the real estate intended to be conveyed is not properly before the court, on a petition for a license to sell for payment of debts and charges of administration; and we think it true that no final determination of the title can be made in this proceeding. This results from an examination of the various statutes upon the subject. If a sale is made, all that the administrator can convey is "the estate, right, title, and interest which the deceased had in the granted premises at the time of his death, or which was then chargeable with the payment of his debts." Pub. Sts. c. 134, § 11. The notice of the petitioner for a license is only to be given to persons interested in the estate; Pub. Sts. c. 134, § 9; and no notice need be given to persons who claim under a title derived independently of the deceased. *Yeomans v. Brown*, 8 Met. 51, 57.

It is recognized by the Pub. Sts. c. 142, § 19, that the validity of such a sale may be drawn in question by a person claiming adversely to the title of the deceased, or claiming under a title that is not derived from or through the deceased, and it is provided that the sale shall not be held to be void on account of any irregularity in the proceedings, if it appears that the executor or administrator was duly licensed, and that he accordingly executed and acknowledged in legal form a deed for the conveyance of the premises. All objections in other respects are open. It is, moreover, provided in the Pub. Sts. c. 134, § 15, that when an executor or administrator is licensed to sell lands fraudulently conveyed by the deceased, or fraudulently held by another person for him, or lands to which he had a right of entry or of action, or of which he had a right to a conveyance, he may first obtain possession of such lands by entry or by action; and this course is often, if not usually, pursued, where the title is in doubt. *Norton v. Norton*, 5 Cush. 524. *Tenney v. Poor*, 14 Gray, 500. *Hannum v. Day*, 105 Mass. 33.

It thus appears, that not only is an executor or administrator unable to affect the title of one claiming independently of the deceased, but a method is provided for him to clear up the title,

in cases of doubt, before making the sale. If this method is not adequate to meet all cases, it is of course competent for the Legislature to extend the provisions of the Pub. Sts. c. 176, to executors and administrators who are licensed to sell real estate, so as to allow them to bring a petition for the settlement of the title in like manner with ordinary persons in possession of real property. But it is obvious that the statutes do not contemplate a decision by the Probate Court upon a petition for leave to sell, which shall pass upon the validity of the title of the deceased. It is true that the condition of the estate should be considered in determining whether to grant a license; but this is only as it may affect the expediency of granting a license to sell lands, the title to which is doubtful. *Sprague v. West*, 127 Mass. 471.

In the present case, the report finds that the judge of the Probate Court granted the license to sell, in order to sell the real estate of the deceased, respecting which the controversy now exists. It is possible that he was not aware of the question now presented, or he may have expected that the administrator would take steps to have the title settled before proceeding to make a sale. However that may be, we are of the opinion, for the reasons stated, that the question of the title is not now properly before the court.

The administrator, without waiving his position that the question of title is not properly before the court, asks us, nevertheless, to pass upon the question of title. But not all of the parties interested in this question are before the court. The appellant is but one of the children of the deceased, and it appears by implication that there is more than one child. These children claim directly under the will of Oliver Greenwood, and independently of the deceased. The administrator has not brought them all before the court, and has no means of doing so.

The case of *Larned v. Bridge*, 17 Pick. 339, has been cited as one which sanctions the determination of the title to real estate upon such a petition. But that case was quite different in its facts, and no such question was involved in it. The testator there gave to his wife an estate for life in his real and personal property, with a superadded power to sell in case the income should prove insufficient for her comfortable support. It was held that this was a power of sale which could only be executed

by her personally, and that the will gave no authority for such sale by an executor or administrator, with the will annexed, to raise money for the payment of debts incurred by her for such support in her lifetime; and that the Probate Court had no authority to grant a license for such sale. No application was made for a license to sell land for the payment of debts of the testator; but it was contended that the administrator, with the will annexed, might sell land under the power conferred by the will, after the death of the testator's widow. The court held otherwise.

In the present case, the judge of probate was authorized to grant a license for the sale of the real estate. In support of the appeal from his decree granting such license, no argument has been addressed to us that such sale would be injudicious, as likely to yield an inadequate price, by reason of doubt as to the validity of the title; as it was suggested in *Sprague v. West*, 127 Mass. 471, might be done. As the case now stands, we see no reason for reversing the decree; leaving it for the administrator to determine whether it is inexpedient to proceed with the sale in the present condition of the title; or whether, after all, the title may be considered as free from real doubt.

Decree of Probate Court affirmed.

JEREMIAH T. CAHILL vs. ELIDA M. CAPEN.

SAME vs. MABEL S. PIPER.

Worcester. October 2, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Mechanic's Lien — Entire Contract for Labor and Materials —
Apportionment of Labor.*

A builder erected two houses for adjoining owners of land for distinct prices under separate contracts, and a plumber contracted with him to furnish the labor and materials for the plumbing in both houses for an entire price. The plumber filed petitions under the Pub. Sts. c. 191, to enforce liens for the labor only performed on each house, and at the trial offered to show what such labor was worth. Held, that the petitions could not be maintained.

TWO PETITIONS to enforce mechanic's liens for labor only performed upon houses owned by the respective defendants.

At the trial of both cases together in the Superior Court, before *Dewey, J.*, the petitioner offered to show that the respondents were the owners of adjoining lots of land, and that each employed one Murphy, a builder, to erect a house for her upon her lot, under a separate contract and for a distinct price; that Murphy contracted with the petitioner to furnish the labor and materials for the plumbing of both houses; that he duly performed his contract, the materials furnished being the same in value and the method of construction the same for each of the houses; and that the respective values of the labor and material furnished upon each house was ascertainable, the labor performed upon each house amounting to a certain sum.

The judge ruled that the contract between Murphy and the petitioner to furnish labor and materials in plumbing both of the houses for one entire price, and not for a distinct price as to each house, was not within the statute authorizing a mechanic's lien for labor only, under an entire contract for both labor and materials, and ordered the petitions to be dismissed. The petitioner alleged exceptions.

C. A. Merrill, for the petitioner.

D. Manning, Jr., for the respondents.

KNOWLTON, J. These cases cannot be distinguished in principle from *Childs v. Anderson*, 128 Mass. 108. In that case the petitioner sought to establish a lien upon a building of the respondent for labor performed and furnished, under an entire contract with a duly authorized person to do work and furnish materials for an entire price upon that and upon three other buildings not owned by the respondent. But the court held the St. of 1872, c. 318, (Pub. Sts. c. 191, § 2,) to be inapplicable to such a case. That statute provides that, where labor is performed or furnished, or materials are furnished "upon an entire contract and for an entire price, a lien for the labor alone may be enforced, if it can be distinctly shown what such labor was worth, but in no case shall such lien be enforced for a sum greater than the price agreed upon for the entire contract."

In seeking the aid of this statute, where a contract required labor to be performed or furnished, and materials to be furnished upon several buildings of different owners for an entire price, a petitioner, in his several suits to enforce liens upon each of the different estates, would find it impossible to show in each case "the price agreed upon for the entire contract," by which the statute limits the sum for which a lien can be enforced.

The same statute also provides, that, in making a statement to be filed in the registry of deeds, "if a lien is claimed only for labor performed or furnished under an entire contract which includes both labor and materials at an entire price, the contract price, the number of days of labor performed or furnished, and the value of the same, shall also be stated." Pub. Sts. c. 191, § 6. This calls for the contract price for the labor and materials upon the building named in the statement. But in the case supposed, there is no such contract price. There is a single price for the labor and materials upon all the buildings named in the contract, and there is no way of apportioning it. The statute was not intended to cover cases of this kind.

Exceptions overruled.

WILBUR H. HANKS vs. BOSTON AND ALBANY RAILROAD
COMPANY.

JOSHUA E. BEEMAN, administrator, vs. SAME.

SAME vs. SAME.

Worcester. October 2, 3, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Private Railroad Crossing — Invitation to Public — View by Jury —
Due Care by Person killed.*

At the trial of an action against a railroad corporation for causing the death of a person at a crossing, there was evidence that the corporation had constructed and planked the crossing; that it connected an open freight-yard with an unenclosed lumber-yard, from which a private way used by many persons led to a highway; that there were wheel tracks leading from a town way into and across the freight-yard to the crossing; that teams of all kinds passed over it

daily to and from the freight-yard and lumber-yard; but there was no evidence of the continuous passage of a team over it in either direction between the town way and the highway. The jury took a view of the locality. *Held*, that there was evidence to go to the jury that the railroad corporation had held out inducements to the public to use the crossing.

On the issue whether the person killed was in the exercise of due care, there was evidence that he approached the crossing, driving his horse at a trot; that the outlook along the railroad in one direction was cut off by a building and by freight cars standing near the crossing, except at a single point about twenty feet therefrom; that no warning signals were given by a train approaching from that direction, and that, as he got upon the crossing and saw the train, he at first checked his horse and then started him again, when he was struck and killed. *Held*, that there was evidence that he was in the exercise of due care.

THREE ACTIONS OF TORT. The first action was for personal injuries received by the plaintiff, while driving with Frank W. Moses, by being struck by a locomotive engine at a crossing of the defendant's railroad. The second and third actions were brought by the administrator of the estate of Moses, to recover for his death and for the damage to his horse and wagon. The cases were tried together in the Superior Court, before *Dewey, J.*, who refused to rule that there was no evidence to warrant a finding that Moses was induced or invited by the defendant to go upon the crossing, or that he was not in the exercise of due care, and, after verdicts for the plaintiff in each case, allowed a bill of exceptions, the material part of which appears in the opinion.

F. P. Goulding, for the defendant.

W. S. B. Hopkins, (*J. E. Beeman* with him,) for the plaintiffs.

DEVENS, J. It will be conceded, not only that the defendant corporation might so conduct itself in regard to a crossing over its railroad as to give a tacit license or assent to its use as a crossing by the public, but that the circumstances under which such use was permitted and enjoyed might also amount to an inducement or invitation to persons having occasion to pass thereon to treat the same as a highway, and to use it for any lawful purpose. *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368. *Murphy v. Boston & Albany Railroad*, 133 Mass. 121. *O'Connor v. Boston & Lowell Railroad*, 135 Mass. 352, 358.

If Moses attempted to cross merely by license or under a permission of the defendant, these actions cannot be maintained. The first question is, therefore, whether, upon the evidence in

the cases, the defendant had so held out the crossing as one to be used and enjoyed by the public, that Moses, who was the driver of a job wagon, may be said to have attempted by its inducement or invitation to use it.

There was evidence tending to prove the following facts. The crossing, which was carefully planked, had been constructed by the defendant across its railroad, which at this point ran east and west. It was eighty feet in length and twelve in width, extending over six railroad tracks, and led directly from the freight-yard of the defendant, on the south, into the grounds of Whitney and Company, on the north. One Fisher, who had previously owned the land occupied by Whitney and Company, had possessed a right of way over the defendant's railroad, but he had deceased at the time the way was thus prepared. It did not appear that at this time, or at that of the accident, any person had any right of way over the railroad, except such, if any, as might be derived from the license or the invitation of the defendant. Main Street ran north and south, and crossed the railroad at a point west of the crossing and of the premises of the defendant and of Whitney and Company. Wheel tracks led from Brigham Street, a town way leading to the east from Main Street and lying to the south of the defendant's premises and the crossing, which passed along the southerly side of a milk-shed, grist-mill, and freight-house of the defendant, to the south end of the crossing, while other wheel tracks led to the same place from a point where Brigham Street intersected Cottage Street, another town way leading off from Brigham Street towards the south, at a point nearly opposite the crossing. These wheel tracks extended through the open area which surrounded these buildings of the defendant, which area was used as a mill and freight yard. The premises of Whitney and Company lay on the northerly side of the railroad, easterly and westerly of the crossing; they were unenclosed, but contained a box factory, planing-mill, and lumber-yard. From them a way led, over the premises of one Smith, westerly to Main Street, between a straw shop and bakery belonging to Smith. This was a private way appurtenant to the premises occupied by Whitney and Company, but used in common by them, by Smith, by the owners or occupants of the

straw shop and bakery, and by others. This private way was unenclosed, and from one to two rods in width as travelled, and there were other buildings besides those described on the Smith estate.

There was further evidence, that teams, express wagons, and sometimes lighter carriages, to the number of from ten to twenty-five a day, passed over the crossing, conveying lumber and other articles to and from the premises of Whitney and Company, flour to the bakery, and coal, pasteboard, etc. to the straw shop, and bringing articles therefrom, also depositing rubbish behind the bakery and in the swamp beyond the premises of Whitney and Company, and drawing wood from the swamp in the winter. There was also evidence that people from out of town came that way by the crossing to the premises of Whitney and Company, "that people in town would go both ways," and "that any one who wanted to cross could do so when the road was clear"; and that, in the language of one witness, "express wagons, market wagons, coal teams, truck teams, wood and lumber teams, all kinds of business teams, and occasionally private teams," went across there. It appeared that the crossing was sometimes obstructed by cars kept on the track nearest the premises of Whitney and Company, which were moved, however, when they requested.

Upon this evidence, a case was presented, to be decided by the jury, whether an inducement or invitation had been held out to the public to use this crossing for any lawful purpose, of which Moses was entitled to avail himself. In deciding this, it was a circumstance to be considered, indeed, that the crossing could only be reached through the premises of Whitney and Company or the defendant, but in connection with the method in which the latter had permitted its freight-yard and the area around its buildings to be used, and the wheel tracks it had permitted to be there established. Nor was it decisive against the claim of the plaintiffs, that there was no evidence that, previous to the injury, any team had passed through the premises of Whitney and Company and Smith from Brigham Street to Main Street, or in the opposite direction, in a continuous journey.

In determining whether there was an inducement to travellers to avail themselves of a crossing, it has no doubt been held im-

portant in some cases that such crossing directly connected two parts of the same street. *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368. *O'Connor v. Boston & Lowell Railroad*, 135 Mass. 352, 358. But as an invitation to enter premises may be established even when the traveller is not invited to go beyond them, so there may be an invitation to cross them to the premises of others, but not necessarily to any public way beyond.

In holding that the evidence was sufficient to justify the submission of the case to the jury on this point, it is to be observed that the jury may have been materially aided by a view taken by them of the locality. *Tully v. Fitchburg Railroad*, 134 Mass. 499.

The defendant further contends, that there was no evidence of due care on the part of Moses as he approached the track. While he was driving at a trot, there was nothing to show that this was an improper or dangerous pace. There is no evidence that he looked for a coming train, but as he approached the crossing his view was obstructed by cars which were standing on the rails of the first track, near the box factory and easterly of the crossing. It appears by one witness that there is a point some twenty feet from the crossing and upon the roadway where a view could have been obtained to the east between the box factory and the cars as they stood on the track. But it is impossible to say that because Moses is not shown to have availed himself of this opportunity for a casual glance, he was not in the exercise of due care. *Williams v. Grealy*, 112 Mass. 79. Nor was it affirmatively shown that Moses listened for a coming train, but it was in evidence that witnesses, one of whom stood close by the office door near which he passed, heard no sound of an approaching train until the alarm whistle was sounded, when the engineer discovered Moses on the crossing. The engineer, indeed, testified that he rang the bell as he approached the crossing, but as it was not heard by others, the jury may have believed there was some mistake about this. To some extent Moses had a right to expect that the usual signals of warning of an approaching train would be given, and to rely on this. *Chaffee v. Boston & Lowell Railroad*, 104 Mass. 108.

Taking all the circumstances into consideration, the pace at

which Moses was travelling, the obstructions which intervened between himself and his sight to the east as he entered upon the crossing, the fact that the sound of the approaching train was not heard by others, it was for the jury to say whether he had exercised reasonable precaution in entering upon the crossing. That the hesitating conduct of Moses after he saw the train, in checking his horse and then starting him again, considering his alarm and consequent confusion, was otherwise than that of a prudent man, was not seriously contended.

Exceptions overruled.

SOUTHBRIDGE SAVINGS BANK vs. CHARLES F. MASON
& others.

Worcester. October 4, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Mortgage of Real Estate — Fixtures — Evidence — View by Master.

On the issue whether machines in a calico-printing factory were, as between mortgagor and mortgagee, a part of the realty, it was held, upon evidence reported by a master, who had visited the factory and had seen each machine and the mode of its attachment, that his findings that some of the machines were a part of the realty and others were not, could not be said, as matter of law, to be erroneous.

KNOWLTON, J. This is a bill in equity by which the plaintiff seeks to enjoin the defendants from removing machinery and other property from real estate of which it is the mortgagee, the defendants having succeeded to the title of the mortgagor. A preliminary injunction was issued as prayed for. The case was referred to a master, who heard the parties, and made a report, and upon a recommittal of the report, with instructions to make certain special findings, heard them again, and made a supplemental report. The defendants filed exceptions to both of these reports. Upon a hearing in the Superior Court, upon the pleadings, the master's reports, and the exceptions, a decree was entered making the injunction perpetual, in accordance with the

findings made by the master, and the case comes to this court upon appeals by both parties.

Many questions were involved in the issues between the parties, but the only ones argued before us relate to the master's findings that certain articles of machinery and other similar property were a part of the real estate, and that certain other articles were not.

The plaintiff's mortgage was dated August 3, 1869, and it covered land upon which a mill was then in process of erection. This mill was soon afterwards completed and fitted up to be used in the business of calico printing, which includes dyeing and bleaching, and was supplied with machinery adapted to the prosecution of that business. Adjacent to it, and covered by the same mortgage, was a machine shop, containing machinery designed to be used in making repairs.

The master, in his supplemental report, makes findings upon sixty-seven different items of articles, and classes of articles, of machinery and other kindred property. All of those now in dispute, except one etching machine, one setting-out table, one bolt-cutting machine, one straightening machine, two wood planers, and one wood-matching machine, he found to be so connected with the real estate as to pass to the mortgagee. These seven machines he found to be personal property, belonging to the defendants. The plaintiff's claim relates to the six items which include these, and the defendants' exceptions to twenty-eight of the other items. Upon neither side did the arguments before us bring to our attention anything in the nature, or construction, or mode of attachment, or use of any particular machine, which materially distinguished it from others which were included in the same general finding. But certain considerations were urged upon us by the plaintiff, which apply alike to each of the seven machines which were found to be personal property; and certain other considerations were presented by the defendants, which were relied on to establish their claim to the twenty-eight articles and classes of articles named in their first exception to the supplemental report.

Whether a machine set up in a building is real estate or personal property, is commonly a mixed question of law and fact. The general principles of law applicable to such ques-

tions, when they arise between mortgagor and mortgagee, are well established. "Whatever is placed in a building subject to a mortgage, by a mortgagor or those claiming under him, to carry out the purpose for which it was erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, becomes part of the realty, as between mortgagor and mortgagee, and cannot be removed or otherwise disposed of while the mortgage is in force." The "object, the effect, and the mode of its annexation," must be considered. *Smith Paper Co. v. Servin*, 130 Mass. 511, 513. *Pierce v. George*, 108 Mass. 78. *McConnell v. Blood*, 123 Mass. 47. *McLaughlin v. Nash*, 14 Allen, 136. A finding of fact cannot be set aside upon appeal in this court, unless it is plainly wrong. *Reed v. Reed*, 114 Mass. 372. *Montgomery v. Pickering*, 116 Mass. 227, 230.

In the case at bar, the evidence reported, descriptive of particular machines, is as to many of them exceedingly meagre; but it appears by the supplemental report that the master visited the factory, and saw each machine and the mode of its attachment. Under these circumstances, there are strong presumptions in favor of his findings, and the findings must be assumed to be correct, unless the facts and evidence reported show that they are wrong.

There was ample evidence to support the finding that "the building was built for a calico-printing factory, and was adapted to the use of the machinery named in the bill, which was put in to carry out the purpose for which the building was built." Several witnesses testified directly upon that point. Many of the machines rested upon stone foundations, which were laid as a part of the construction of the building specially for their support. Trenches were let into the floors to accommodate the washing machines. The nature of the business for which the building was erected was such as to call for many fixtures which seem to have been intended as a part of the real estate. Among these were two large steam boilers, a Knowles and Sibley pump set on stone and fastened with iron bolts, iron kettles and tubs set in brick, four iron bleaching kiers, very bulky and set on stone foundations in a building built expressly for them, from which they could not be removed, one fire pump, fastened on

heavy timbers and connected with the flume by bolts and flanges, two hydraulic presses and pump, one end on a stone foundation and the whole supported by timbers, one large Fairbanks platform scales set out of doors, one Fairbanks platform scales in the color room, set in the floor like all such scales, and color kettles set in brick, supplied with pipes for hot and cold water, the pipes running on stone piers for support. Many other machines were very heavy, and most of them were fastened to the building, but some of them stood in position by their own weight. All the machinery was said by the witnesses to be necessary to the business for which the building was erected. The master found that, at the time of making the mortgage, the mortgagor and mortgagee "contemplated the addition of this machinery to the factory, as a part of the real estate, in connection with the loan."

Besides the facts already stated, there was evidence that the mill was in process of erection when the loan was made, and that the sum of \$75,000, which was lent on the mortgage security, was to be furnished to the mortgagor in instalments of \$5,000 to \$10,000 per month, and that when \$60,000 of the amount had been paid, a mortgage on the machinery and personal property in the works was to be given in addition, as collateral security, and that such a mortgage subsequently was given, covering, among other things, some of the machinery that afterwards went into the mill, and which had not then been set up in the mill. A second mortgage of the same real estate was given by the mortgagor, which was made subject to the plaintiff's mortgage, and which contained a power of sale under which it was foreclosed by those under whom the defendants claim. In the deed made in pursuance of the sale under this power was this language: "With all the rights, privileges, and appurtenances, and especially all the water rights connected therewith in any way, and all the fixed machinery in the buildings on said premises, set up and ready for use therein, the schedule of said machinery being given in the affidavit subjoined hereto." The schedule referred to included all the machinery claimed by the defendants in this suit. The grantee in that deed agreed to assume and pay the plaintiff's mortgage, and save the mortgagor harmless therefrom. The mortgagor made a separate instru-

ment, acknowledging that the personal property named in the schedule had been included in the sale with his consent, and describing it as having been named in two mortgages of personal property, which the report shows that he had previously given to the holders of the second mortgage upon the real estate, and which covered part of this property before it was connected with the mill. This instrument contained the following words in reference to the property: it "was included in the said sale for the purpose of keeping the property together, and thereby increasing its value, and the same is hereby delivered to be held by the said Earl P. Mason [the purchaser] as a part of said premises." This evidence was proper to be considered as bearing upon the relation which the machinery and other articles connected with the building were intended to have to the building itself. And we cannot say, as matter of law, that the master erred in finding that all the articles which the defendants now claim against his findings were affixed as permanent improvements to the real estate. Among these articles were the Fairbanks platform scales set in the floor, the large Fairbanks scales outside, the hydraulic presses and pump, and the four kiers, to which we have already referred. Also, five printing machines weighing from two to three tons each, and each standing on a separate stone foundation constructed for it underneath the floor, one indigo mill, placed under the printing machines, weighing from seven hundred to eight hundred pounds, resting on rock and bolted down to a foundation prepared for it, three dyeing machines weighing over a ton each and bolted down, and numerous other machines of similar character, and some smaller and lighter. The defendants' exceptions must therefore be overruled.

The plaintiff's counsel asked the court to rule, that, upon the master's findings of fact, supported by the evidence reported, the seven machines hereinbefore referred to as claimed by the plaintiff were a part of the real estate covered by its mortgage, and upon the court's refusal so to rule, and ruling that they belonged to the defendants, appealed from so much of the decree as relates to these seven machines. His argument rests upon the ground that the finding as to the intention with which the mortgagor put the machinery into his mill and machine shop,

requires a finding that these machines were real estate. But the mere fact that an owner intends machinery to be used in a mill in the business in which the mill itself was designed to be used, will not make that real estate which in all its characteristics is essentially personal property. He may employ in his business furniture and other chattels, as well as real estate. The evidence stated in the first report did not warrant a finding that the parties intended, when the mortgage was made, that the other property put into the building should be treated as real estate, and held as security under the mortgage, without reference to its character or its attachment to the building.

The master has found that these seven machines were personal property. The report does not disclose such facts or evidence in regard to them as will warrant us in saying, as matter of law, that they belong to the real estate.

Decree affirmed.

A. J. Bartholomew, for the plaintiff.

J. M. Cochran, for the defendants.

CHARLES NOYES vs. INHABITANTS OF GARDNER.

Worcester. October 4, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Personal Injuries — Defect in Highway within Railroad Location at a Grade Crossing — Notice.

At the trial of an action against a town for an injury caused by a rotten plank in a sidewalk, there was evidence that the sidewalk was on a principal street and was largely used; that it had been for some time in very poor condition, several of the planks composing it being rotten and decayed; and that one of the selectmen of the town passed over it daily. *Held*, that there was evidence of a defect, of which the town had or might have had reasonable notice, and which it could have remedied by the exercise of proper care.

The highway crossed a railroad, consisting of a single track, at grade, and the defective place in the sidewalk was within the line of the railroad location, but several feet from the track. *Held*, that the town was liable for the defect, if it could have remedied it without interfering with the rights or duties of the railroad corporation.

TORT for personal injuries received by reason of an alleged defect upon a sidewalk on Central Street in Gardner, consisting of a rotten plank. Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, which, so far as material, was as follows.

There was evidence tending to show that Central Street was the principal thoroughfare between Gardner and West Gardner, and was used by a great many people; that, as the plaintiff was walking with a companion along Central Street, his companion stepped on a rotten plank, and, as it gave way, tilted one end of it, against which the plaintiff tripped and fell, receiving the injuries; that the condition of the sidewalk at that point had been very bad; that one of the selectmen was in the habit of passing over the sidewalk at the place in question in going to and from his work; and that neither the selectman, nor an agent of the town employed to prosecute and defend all actions brought by and against it, had any knowledge of the rotten plank or of any other defect in the sidewalk, and had never noticed its condition until after the accident, and that no defect had been called to their attention by any one. There was also evidence that the Fitchburg Railroad, consisting at this place of a single track, crossed Central Street at grade; that the defective portion of the sidewalk was within the limits of its location, and at a distance of eighteen feet from the nearer rail; and that the sidewalk at this point ran along the edge of the platform of the railroad station, which was raised slightly above it, and was the only approach to the station from that side of the track.

The defendant asked the judge to rule, that, as matter of law, the action could not be maintained upon this evidence. The judge refused so to rule, and gave instructions to the jury, not otherwise excepted to. The defendant contended that, if the place of the alleged defect and injury was within the located limits of the railroad, the town was not liable, and requested the judge so to rule. The judge refused so to rule, and instructed the jury as follows:

"I instruct you, if these facts be as claimed by the town, namely, in regard to the position of said alleged defect, as hereinbefore stated, the town would still be responsible for the condition of the highway, and for the defect and want of repair,

if there were such, unless the defendant town satisfies you, upon the evidence, that it could not remove or remedy such defect, or want of repair, by the exercise of reasonable care and diligence, without interfering with the authorized and legal construction, use, and operation by the said railroad company of its railroad, including its road bed and track, also the platform and station connected therewith, as described in the evidence.

"In deciding this question, you are to understand and bear in mind that, by a provision of law, at such grade crossings as are referred to in this case, it is made the right and duty of the railroad company, at its own expense, so to guard or protect the rails of its track, by plank, timber, or otherwise, as to secure for the public travelling on said highway a safe and easy passage across its road, and the rights and obligations of the town, in the premises, are subject to and qualified and limited by these rights and duties of the said railroad company as to the construction, maintenance, and use of its railroad and station and platform.

"And the town is not liable for said alleged defect and want of repair, if it could not have been remedied or removed by the use of reasonable care and diligence on the part of the town, and without any substantial interference with the rights and duties of the railroad company."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

E. P. Pierce, (*J. A. Stiles* with him,) for the defendant.

J. Hopkins, (*E. D. Howe* with him,) for the plaintiff.

DEVENS, J. If the injury for which the plaintiff sought to recover in this action, he being himself in the exercise of due care, occurred by reason of a defect in the way, or that part thereof which the town was obliged by law to repair, which defect might have been remedied, or which injury might have been prevented, by reasonable care and diligence on its part, the town is responsible in damages therefor, if it had reasonable notice of the defect, or might have had notice by the exercise of proper care and diligence. Pub. Sts. c. 52, § 18.

It is quite clear that there was evidence to be submitted to the jury that the defect could have been remedied, and that the town had, or might have had, reasonable notice thereof. The

defect consisted of a rotten plank in the sidewalk. There was testimony from several witnesses that this sidewalk was largely used, and was on one of the principal streets; that it led from Gardner to West Gardner, across a railroad track; that it was passed over daily by one of the selectmen; that it had been for some time in very bad condition; and that several of the planks composing it were rotten and decayed. Without enlarging on the evidence or attempting fully to restate it, it was sufficient to permit the jury to infer that the proper officers of the town knew, or with reasonable diligence might have known, the condition of the way. The public character of the way, the nature of the defect therein, the time which it had existed, all bore upon this question. *Hanscom v. Boston*, 141 Mass. 242. *Hinckley v. Somerset*, 145 Mass. 326. While no one, so far as the evidence shows, had previously noticed the rottenness of the individual plank, by the breaking of which the injury occurred, proper care and attention to the sidewalk would have revealed this, and a remedy could readily have been applied.

There was evidence that the place of the alleged defect and injury, although within the highway, was also within the located limits of the railroad, which crossed it at grade, and upon this fact the defendant requested a ruling that the town would not be responsible. Towns and cities are not obliged by law, within their boundaries, to keep highways in repair where other suitable provision is made therefor. Pub. Sts. c. 52, § 3. *White v. Quincy*, 97 Mass. 430. The defendant's contention is, that it was the duty of the railroad company to take care and provide at its own expense for this sidewalk, especially as it formed a part of the approach to its own passenger station and platform, and that the town was thus relieved of any duty in regard to its condition. By the Pub. Sts. c. 112, § 124, it is provided that "a railroad corporation, whose road is crossed by a highway or other way on a level therewith, shall at its own expense so guard or protect its rails by plank, timber, or otherwise as to secure a safe and easy passage across its road." Subsequent alterations of the highway, or additional safeguards, may be ordered by the county commissioners, but this clause of the section is not here important, as no such orders were given in relation to the crossing in question. The obligation imposed

upon the railroad corporation is not to secure a safe and easy passage across its location, but across its road as the same is prepared for travel, including, of course, the sleepers or other foundation upon which its rails are laid. Where the road consists of more than one track, these tracks, if placed near to each other, together form its road, and the space which intervenes between the tracks, as well as that between the lines of rail, is to be guarded and protected by it, as it constitutes a part of its road as the same is prepared for travel. *Scanlan v. Boston*, 140 Mass. 84. There is no provision that the railroad corporation shall maintain the highway within its location for ordinary travel where its railroad crosses the highway on a level, except that which is found in the provision above quoted. The character of this provision indicates clearly that it is intended to be confined to the railroad as constructed, used, and travelled, and not to the location. The liability of a town to keep its highways safe and convenient cannot be limited by implication, except to the extent to which the special obligation imposed by statute upon the railroad corporation, or the construction or operation of the railroad, deprives the town of the power to discharge the general statutory duty to which it is subjected. *Jones v. Waltham*, 4 Cush. 299. *Davis v. Leominster*, 1 Allen, 182. *Johnson v. Salem Turnpike*, 109 Mass. 522. *Pollard v. Woburn*, 104 Mass. 84. *Hawks v. Northampton*, 116 Mass. 420. *Old Colony Railroad v. Fall River*, ante, p. 455.

The town was therefore responsible for the defect in the highway, of which it had, or might have had, reasonable notice, if it could have been remedied by the exercise of reasonable care and diligence, without interfering with the construction or operation of the railroad; and as the crossing was at grade, and the railroad corporation was required by law to guard and protect its rails so as to secure to the public a safe and easy passage across its road, the general duty of the town was limited and qualified by that imposed on the railroad corporation. The town would not therefore have been responsible if the defect could not have been remedied without interference with the rights or the duties of the railroad corporation. To this effect were the instructions given by the presiding judge, and the defendant has no just ground of complaint of them. *Exceptions overruled.*

GENERY STEVENS vs. BERT F. PIERCE.

Worcester. October 4, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Insolvent Debtor — Sale in Ordinary Course of Business — Fraudulent Preference.

The Pub. Sts. c. 157, § 98, providing that, if a conveyance of property by an insolvent debtor is not made in the ordinary course of business, that fact shall be *prima facie* evidence that the grantee had reasonable cause to believe him insolvent, apply to conveyances made to pre-existing creditors by way of preference, as recited in § 96.

At the trial of an action by an assignee in insolvency, to recover the value of personal property alleged to have been purchased in fraud of the insolvency laws, there was evidence that the insolvent had disposed of his business and part of the personal property used by him therein; that he offered the rest of such property to the buyer, who had been in his employment and whose wife was a creditor for money lent to use in the business, for a certain price; that the buyer, though he considered it worth much less, without attempting to get it for less, at once accepted the offer; that the buyer received a bill of sale, took possession of the property, and gave an order for the price on a savings bank, where he had no money, but where he afterwards deposited a sum in excess of the order; that he went to the bank with the insolvent's attorney, who drew it and gave it to the insolvent; that the insolvent at once left the State, and that before the money was paid the insolvent was informed, in the buyer's presence, that a warrant for his arrest had been issued. *Held*, that there was evidence for the jury on the question whether the sale was made in the ordinary course of business.

TORT by the assignee in insolvency of one Adams, an insolvent debtor, for the conversion of certain articles of personal property. Trial in the Superior Court, before Dewey, J., who allowed the following bill of exceptions.

There was evidence showing that, in May, 1887, Adams was in business as a grocer, and as such was in possession of a stock of groceries, and several horses and wagons and carriages; that a part at least of this latter property was used in connection with his business as a groceryman; that the defendant was in his employment, as an assistant book-keeper and salesman, under an arrangement whereby he was to receive a fixed salary, with an understanding that he might enter into copartnership with him in case both parties were satisfied with the business; that the defendant's wife lent to Adams the sum of five hundred

dollars in May, 1887, and took his note therefor; that such sum, in case Adams and the defendant formed a copartnership, was to be deemed to be so much capital paid in by the latter, and the note was to be cancelled; that if the copartnership was not formed, the note should be paid to the defendant's wife; that the sum of five hundred dollars was made up of money standing to the credit of the wife in a savings bank, and of money accumulated by her from gifts made her by the defendant; that very soon after the note was given, the defendant decided not to go into partnership with Adams, and so notified him, and it was then arranged that he should remain on a salary; that on July 25, 1887, Adams sold his entire stock in trade to Stone and Carter, and so much of his personal property, consisting of horses, wagons, carriages, and harnesses, as they desired to buy, and they succeeded him in his business at the same stand; that at the time of the sale the note to the defendant's wife had not been paid; that at the same time Adams offered to sell to Stone and Carter the personal property in question, and they declined to buy it, as it was not wanted by them in their business.

There was also evidence that Adams thereupon offered it to the defendant for the sum of three hundred and fifty dollars, and the defendant, though considering it worth only two hundred and sixty-five dollars, made no attempt to obtain it at a less price, but immediately accepted the offer; that Adams thereupon gave to the defendant a bill of sale of the property for that sum, containing full covenants as to title, right to sell, and incumbrances, and delivered it to the defendant; that when the defendant bought, took the bill of sale, and obtained possession of the property, he had in his pocket more than enough money to pay for it; that, instead of paying for it, he went to the People's Savings Bank and deposited four hundred dollars, and immediately drew an order on the bank for three hundred and fifty dollars in favor of Adams; that he accompanied one Redding, who was then acting as the legal adviser of Adams, to the bank, where Redding obtained the amount and paid it to Adams, who was waiting at Redding's office for it, and who, after obtaining it, immediately left the State; that on the night before the money was paid, Adams and the defendant were

together, when Redding came and informed Adams that a writ was in an officer's hands for his arrest; that at the time the order on the bank was given, the defendant had to his credit in the bank the sum of one dollar ninety-eight cents only, which had remained there since 1881; and that he had never deposited in or withdrawn from the bank any sum between 1881 and July 26, 1887.

There was also other evidence, tending to show that Adams was insolvent at the time of the sale to the defendant, and that the defendant had reasonable cause to believe him insolvent. The plaintiff contended, upon the evidence, that the transaction between Adams and the defendant, though in form a sale, was a sham, and that no title passed from Adams to the defendant. The defendant contended that the transaction was an honest one, and that title did pass to him. As to this, the presiding judge gave instructions, which were not excepted to.

The plaintiff also contended, upon the evidence, that the execution and delivery of the bill of sale, and of the property included therein, were for the purpose of paying, in whole or in part, the note aforesaid, from Adams to the defendant's wife, and was therefore void, as a fraudulent preference, and to evade the provisions of the insolvent laws.

The defendant asked the judge to rule, upon the evidence, that the last clause of § 98 of c. 157 of the Public Statutes was inapplicable in the case at bar; and that the circumstances attending the sale, as before recited, were not *prima facie* evidence of a reasonable cause of belief, on the part of the defendant, in the insolvency of Adams.

The judge refused so to rule, and ruled, "1st, that if the property, or the main part of it, was used by Adams in his business as grocer, and if the money borrowed by Adams of the defendant's wife was for use in his business, and if Adams sold the property to the defendant to be applied in payment of the note to the defendant's wife, then it was for the jury to say whether or not the sale was made in the usual and ordinary course of the debtor's business, and that, if they found it was not, that fact was to be taken in this case as *prima facie* evidence of a reasonable cause of belief, on the part of the defendant, that Adams was insolvent, and that the sale was in violation of the insolvent

laws; and 2dly, that the last clause of § 98 was applicable in the case at bar."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. Hopkins, for the defendant.

F. A. Gaskill, for the plaintiff.

DEVENS, J. The bill of exceptions in the case at bar is somewhat obscure, and the counsel, according to their respective briefs and arguments, do not concur in their interpretation of it, or in their view of the question intended to be raised. The action was brought by the plaintiff as assignee of Adams, an insolvent debtor, to recover the value of certain personal property, alleged to have been purchased by the defendant in fraud of the insolvency laws of the Commonwealth; and one ground, if not the only one, upon which the plaintiff sought to establish his case, was that the purchase was made in order thereby to effect a preference for the defendant's wife, who was a creditor of Adams. The defendant asked the presiding justice to rule, that, upon the evidence, the last clause of § 98 of c. 157 of the Public Statutes was inapplicable to the case at bar, and that the circumstances attending the sale as recited were not *prima facie* evidence of a reasonable cause of belief on the part of the defendant of the insolvency of Adams. The presiding justice refused this ruling and ruled, "that if the property, or the main part of it, was used by Adams in his business as grocer, and if the money borrowed by Adams of the defendant's wife was for use in his business, and if Adams sold the property to the defendant to be applied in payment of the note to the defendant's wife, then it was for the jury to say whether or not the sale was made in the usual and ordinary course of the debtor's business, and that, if they found it was not, that fact was to be taken in this case as *prima facie* evidence of a reasonable cause of belief, on the part of the defendant, that Adams was insolvent, and that the sale was in violation of the insolvent laws, and that the last clause of § 98 was applicable in the case at bar."

The plaintiff contends that the only question raised by the exceptions is whether the provision of the Pub. Sta. c. 157, § 98, that sales, etc. not in the ordinary course of business shall be *prima facie* evidence of a reasonable cause of belief by the pur-

chaser in the insolvency or contemplated insolvency of the seller, is applicable to sales, etc., under § 96 of the same chapter, which relates to fraudulent preferences of creditors. If this is the true construction of the exceptions, the case at bar does not require discussion, as it is fully settled that the provision referred to applies to both sections. *Nary v. Merrill*, 8 Allen, 451. *Metcalf v. Munson*, 10 Allen, 491.

These decisions are upon §§ 89, 91, of the Gen. Sts. c. 118, but the Pub. Sts. c. 157, §§ 96, 98, are respectively re-enactments of these, with very slight and purely verbal alterations.

The defendant contends that the question raised by the exceptions is whether the sale to the defendant was of such a character as to afford *prima facie* evidence of a reasonable cause of belief, on the part of the defendant, of the insolvency of the vendor. His request for instructions on this point was, as before stated, "that the circumstances of the sale, as before recited" in the bill of exceptions, "were not *prima facie* evidence of a reasonable cause of belief, on the part of the defendant, of the insolvency of Adams." This instruction could not have been given as matter of law, if there was any evidence to be considered by the jury upon the inquiry whether the circumstances of the sale indicated a sale of the property employed in his business, and thus connected with it, and yet not according to the usual and ordinary course of it. It would be sufficient to say that we cannot review the refusal to give this instruction, when it appears, as it does by the bill of exceptions, that there was other evidence, not reported, that Adams was insolvent at the time of the sale to the defendant, and that the defendant had reasonable cause to believe him so, as such facts must necessarily have qualified and characterized the transaction of the sale. But waiving this, there was evidence of circumstances attending the sale proper to be submitted to the jury in determining its character. The defendant's wife was a creditor of Adams on the same day that he sold out his entire stock in trade to Stone and Carter, and so much of the personal property, such as horses, wagons, etc., as they desired to buy; he offered to the defendant the remainder of the personal property for three hundred and fifty dollars, and, although the defendant considered it worth only two hundred and sixty-five dollars, he made no

attempt to obtain it for a less price, but immediately accepted the offer. He received a bill of sale, and took possession of the property, and gave an order on a savings bank for the amount, where at the moment he had no money, but where he subsequently deposited four hundred dollars in the presence of the attorney of Adams, who then drew the money and gave it to Adams, who left the State. Before the money was paid, Adams was informed in the defendant's presence that a warrant for his arrest had been issued. While it was not directly shown that any of this money came back to the defendant, or that it was paid to his wife, the utter improbability that the defendant would pay for property so much more relatively than he believed it to be worth to the debtor of his wife, whose money had been advanced to aid him in entering into business, and the other circumstances adverted to, tended to show that the whole transaction by which the property of Adams had been transferred to the defendant was a simulated one. To the ruling of the presiding judge, which on the facts therein set forth, if found by the jury, submitted to them the question whether the sale was one made in the ordinary course of business, the defendant has no just ground of objection.

Exceptions overruled.

JOHN G. LEACH & others vs. JOSEPH W. HASTINGS.

SAME vs. WILLIAM H. COWEE.

Worcester. October 4, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Deed — Reservation of Right of Way.

A grantor, in a deed of a lot of land lying "on the southerly side" of a road, reserved a right of way "on the easterly line thereof" from the road aforesaid to his land "situated southerly of the lot of land herein conveyed," the conveyance being made upon condition that a ditch on the westerly line should be kept open to drain the grantor's "adjoining" land. Held, that the right of way was appurtenant only to the grantor's land lying to the south of the rear line of the lot conveyed, and not to land on the southeasterly side thereof fronting on the same road.

TWO ACTIONS OF TORT, for breaking and entering the plaintiffs close on Southbridge Street, in Warren, and passing and repassing thence to and from adjoining land, also on that street. The plaintiffs in each case were the trustees of the Methodist Episcopal Church in Warren. The defendant in the first case, who was the owner of such adjoining land, and the defendant in the second case, who was his tenant, justified under the reservation of a right of way in a deed of Nelson Carpenter, the common grantor of the parties.

The cases were tried together in the Superior Court, without a jury, before *Dewey, J.*, who ruled that the defendants were not so justified, and, after a finding for the plaintiffs in each case, allowed a bill of exceptions, the material part of which appears in the opinion.

F. P. Goulding, for the defendants.

W. S. B. Hopkins, for the plaintiffs.

MORTON, C. J. Nelson Carpenter, being the owner of a tract of land in Warren, lying between Southbridge Street and Crescent Street, conveyed a part of it to the plaintiffs by a deed, in which the description is as follows: "Commencing on the southerly side of the road leading towards Sturbridge, at the northeasterly corner of land sold by Nelson Carpenter to J. W. Hastings; thence running southerly by said land lately owned by said Hastings, and land of Frederic Brigham, one hundred and thirty-three feet; thence easterly seventy feet to a stake, thence northerly one hundred and thirty-three feet to the aforesaid road; thence westerly on said road eighty-six feet to the first-mentioned bound; reserving to the said Nelson Carpenter, his heirs and assigns, the right to pass and repass, with loaded teams or otherwise, over the land herein conveyed, on the easterly line thereof, from the road aforesaid, to land of said Carpenter, situated southerly of the lot of land herein conveyed. This conveyance is made and accepted upon the express condition that grantees and their successors shall forever keep an open ditch on the westerly line of the premises herein conveyed, sufficient for the free passage of water from the land of said Carpenter adjoining."

Carpenter afterwards made a conveyance to the defendant Hastings of a lot of land adjoining the plaintiffs' lot, lying

southeasterly of it, fronting on "the road leading towards Sturbridge," now called Southbridge Street, and being of about the same depth as the plaintiffs' lot. The defendants claim the right to use the way reserved as above stated as a means of access to this lot; and the only question in the case is whether the right reserved to pass and repass is appurtenant to the lot of the defendant Hastings.

It is true, as claimed by the defendants, that if, by the terms of the reservation, the way was made appurtenant to the whole remaining land of the grantor, Carpenter, it would remain appurtenant to every parcel of it, if Carpenter afterwards divided it into lots. *Whitney v. Lee*, 1 Allen, 198. *Müller v. Washburn*, 117 Mass. 371. But we are of opinion that this reservation does not create a right of way which is appurtenant to the whole of the remaining land of the grantor. It does not reserve the right to pass and repass to the remaining or adjoining land of the grantor, which would be the natural form of expression if he had intended that the way should be appurtenant to the whole of his remaining land. It reserves "the right to pass and repass, with loaded teams or otherwise, over the land herein conveyed, on the easterly line thereof, from the aforesaid road to land of said Carpenter, situated southerly of the lot of land herein conveyed," thus indicating that the way was for the benefit, not of the whole of his remaining land, but of such part of it only as comes within the description of his land "situated southerly of the lot of land herein conveyed." The lot of the defendant Hastings does not fairly come within this description. It lies southeasterly of the front part of the plaintiffs' lot, but no part of it falls southerly of the whole lot.

It is clear that Carpenter, when he made his deed to the plaintiff, did not know the exact points of the compass. He treats the lot as lying on the southerly side of the road; he regards the side lines as running northerly and southerly, and the front and rear lines as running easterly and westerly. In his mind, the lot which he afterwards sold to the defendant Hastings was easterly, and not southerly, of the plaintiffs' lot. When he restricted the right of way to his land situated "southerly" of the lot conveyed, he intended to indicate the position of such land in relation to the plaintiffs' lot, and meant

his land which was geographically situated south of the rear line of the lot. See *Cronin v. Richardson*, 8 Allen, 423. Other parts of the deed fortify this view. The way intended is described as a way "over the land herein conveyed, on the easterly line thereof from the road," which points to a way along the easterly line to the rear line of the lot. The deed shows, that, when the grantor intended to reserve a right or privilege for the benefit of the whole of his remaining land, he knew how to do so; as in the provision for a ditch, which is to be kept open "sufficient for the free passage of water from the land of said Carpenter adjoining," thus including the whole of the remainder of his land. It may also be noted that there was no occasion for reserving a right of way in favor of the lot of the defendant Hastings, as it had its own front upon the road.

For these reasons, we are of opinion that the defendants have not, by virtue of the reservation in question, any right of way over the plaintiffs' land, and that the ruling of the Superior Court was right.

Exceptions overruled.

NORWICH AND WORCESTER RAILROAD COMPANY vs. CITY OF WORCESTER.

Worcester. October 4, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Change of Grade of Way — Damages — Lessor as the "Owner" of Adjoining Land — Joinder of Party — Evidence.

The lessor of a railroad was to purchase land for any change in the road, fit it for use, and furnish the money, upon which the lessee was to pay interest, and thereupon the "new track, grounds, and buildings" so provided were to be included in the lease. Land was taken by the lessor under a statute for a new freight station and yard, which land, before it was fitted or used for railroad purposes or turned over to the lessee, was damaged by a change of grade in an adjoining street, and the lessor alone filed a petition for a jury to assess the damages. *Held*, that the petition could be maintained.

At the trial of such petition, evidence of a demand by the lessee upon the lessor to build a retaining wall rendered necessary by the change of grade was admitted *de bene*, and was not afterwards referred to by court or counsel. *Held*, that the evidence was immaterial.

PETITION to the Superior Court, under the Pub. Sts. c. 52, §§ 15, 16, for a jury to assess the damages to land, of which the petitioner was alleged to be the owner, by a change of grade in repairing Southbridge Street in Worcester. Trial in the Superior Court, before *Dewey, J.*, who allowed a bill of exceptions, in substance as follows.

Evidence was introduced tending to show the following facts. The respondent lowered the grade of Southbridge Street, which was a highway, for the purpose of repairing it, by taking away an embankment in front of and adjacent to the land in question, and thereby rendered a retaining wall necessary to support the land.

On February 9, 1869, the petitioner, as party of the first part, executed to the Boston, Hartford, and Erie Railroad Company, as party of the second part, a lease, containing the following provisions, which alone are material:

“Said party of the first part hath demised, leased, and rented, and doth by these presents demise, lease, and rent, for the term of one hundred years from and after the first day of February, A. D. eighteen hundred and sixty-nine (1869), unto the said party of the second part, and its successors, all and singular, the railway of the said party of the first part, extending from a point in the city of Worcester, in Massachusetts, to Allyn’s Point, so called, some miles southerly of the city of Norwich, in Connecticut, with its railway in said city of Norwich, together with all the lands on which said railway is or shall be located within said terminal points, and which are connected with the uses of said railway, and all the rights, easements, franchises, and privileges in connection therewith, or which are appurtenant thereto, and all the turn-outs, branch tracks, depot grounds, stations, depots, superstructures, erections, and fixtures used therewith and belonging thereto, and the lands and premises on which the same are situate and standing, now used and belonging, and to be used or belonging, or in any wise appertaining to said railroad, together with all and singular the real estate, tenements, hereditaments, and appurtenances of the party of the first part. . . .

“Said party of the second part agrees that it will at all times keep and maintain said railway, in its road-bed, bridges, super-

structures, buildings, grounds, fences, and in each and all things pertaining to the same, and in everything pertaining to the rights and uses of the public connected therewith, in as good order, repair, and condition as when received, and replace and keep up all such of the fixtures, rolling stock, and furniture supplies and other property, as shall be shown by an inventory, to be taken and appended to this indenture, as shall or may wear out, or be destroyed by use, fire, flood, accident, design, or removal; so that at all times there shall be upon and connected with said leased railway all things evidenced by such inventory, in as good condition and to as full extent and amount as shown by said inventory; and such new property or renewals as aforesaid shall be and stand the estate of said party of the first part, in the place and stead of any of like property worn out, destroyed, or removed. . . .

“ It is mutually stipulated, that, in case the parties hereto shall agree that any portion of the leased real estate, which shall not be needed in the operation of the railway, or that if a change of location of track and station at Worcester, or at any other place, will be best for the public and the parties hereto, said party of the first part may sell and convey such portion of said real estate, agreed upon as aforesaid, and invest the proceeds in a fund to be known as the improvement fund; and such fund may be applied to the purchase of any new or changed line, or grounds and buildings, in the place and stead of those sold; and if, by such change, or purchase, or construction of new buildings, a greater sum be required than is obtained from the sale of property as aforesaid, said party of the first part is to provide for and pay the same, by issue of new stock or otherwise; and said party of the second part shall pay ten per cent per annum on the amount of such expenditure over and above the amount of funds in the improvement fund; and the new track, grounds, and buildings shall be included under this indenture of lease, for the same time and upon the same terms and conditions that the railway is herein leased. . . .

“ Said party of the first part agrees to do all lawful corporate acts and things, upon request of said party of the second part, to enable it to make any additions to lands for the use of the demised railway, or to enable said party of the second part to

improve said railway in its curves, cuttings, embankments, or lines of sight, or depot, or other grounds."

Under the St. of 1884, c. 157, the petitioner took the land in question, which lay between its old location and Southbridge Street, as a part of a new site for a freight station and yard, and duly filed its location of the same on October 27, 1885. The petitioner then proceeded to remove the buildings, grade the land, build a freight-house, lay tracks, and prepare the premises for station purposes, and for tracks and yard room to be used in connection therewith, including the building of the retaining wall, the work, except that on the wall, being in process at the time the grade of the street was lowered, and not completed until 1887.

The New York and New England Railroad Company, which it was agreed was the legal successor of the Boston, Hartford, and Erie Railroad Company, and owned whatever the lease conveyed, was, at the time of the lowering of Southbridge Street, in possession of and operating all the property and franchises of the petitioner under the lease, except that it did not take actual possession of the land in question until it had been completely prepared for use by the petitioner, in 1887, and after the lowering of the street, when the premises were turned over to it, as successor of the lessee. The expense of taking and constructing the new freight station, yard, and tracks was borne by the petitioner, and was to be provided for by the issue of new stock by it, on which the New York and New England Railroad Company was to pay the same rate as rent as it paid on the existing stock, if there was an excess of expenditure over the receipts from real estate at the old location.

The petitioner offered the testimony of an agent of the New York and New England Railroad Company, that he had a conversation with an agent of the petitioner, after the work was done in the street, in which conversation the former demanded that the petitioner should build the retaining wall to protect the property. The evidence was admitted *de bene*, against the respondent's objection, and was not again referred to by the judge or counsel. The witness testified that he was acting for his company.

The respondent asked the judge to rule as follows: "1. The evidence does not show the petitioner to be the owner of the

premises, in the sense of the statute, and it cannot therefore maintain the petition. 2. The evidence does not show that the petitioner has any other than a reversionary interest in the premises described, and it cannot recover any damages, except to its reversionary interest, after the expiration of the lease. 3. This petition cannot be maintained without joining the New York and New England Railroad as a party."

The judge refused so to rule, but ruled that, upon the facts stated in regard to the title of the petitioner and its occupancy of the premises, which were not disputed by either party, the petitioner was to be treated as owner of the property, within the meaning of the statute, and that its right to damages was the same as if the lease had not been given, and that it was not necessary that the New York and New England Railroad Company should be joined as a party.

The jury returned a verdict for the petitioner; and the respondent alleged exceptions.

F. P. Goulding, for the respondent.

T. G. Kent & G. T. Dewey, for the petitioner.

W. ALLEN, J. The petitioner in 1885 took certain land, under the St. of 1884, c. 157, for a new station and yard in the city of Worcester, and before the land was fitted or used for railroad purposes it was injured by reason of the lowering of the grade of an adjoining street. To this petition for damages it is objected that the petitioner had no greater interest in the land than that of lessor. In 1869 the plaintiff made a lease for one hundred years of its railroad, including the old station and yard at Worcester, to the Boston, Hartford, and Erie Railroad Company, whose successor is the New York and New England Railroad Company. After the new station buildings, tracks, and yard were completed, they were taken possession of by the New York and New England Railroad Company, and the old location was discontinued. The question is, whether the land came under the operation of the lease at the time when it was taken by the petitioner, or when it was fitted for use and taken possession of by the lessee as part of the railroad.

The lease was of the railroad of the lessor, extending from Worcester to Allyn's Point in Connecticut, "together with all the lands on which said railway is or shall be located within

said terminal points, and which are connected with the uses of said railway," and all rights and privileges connected, and all tracks, depot grounds, buildings, etc., "now used and belonging, and to be used or belonging, or in any wise appertaining to said road," etc. Another provision of the lease relates to a change of the road and station grounds in Worcester, or at any other place, and provides for the purchase of land for that purpose, and for the cost of the new line, grounds, and buildings, and that "the new track, grounds, and buildings shall be included under this indenture of lease, for the same time and upon the same terms and conditions that the railway is herein leased."

It seems clear that it was not the intention of the parties that land purchased for the construction of a new station and yard should come under the lease as soon as purchased. The lease was of a completed road, ready to be used by the lessee. The road-bed, buildings, and all the leased property, were to be maintained and kept in repair, and replaced when destroyed by the lessee; the lessee had authority to improve the road, and the lessor was bound, at the request of the lessee, to do all lawful corporate acts to enable the lessee at its expense to improve the railroad or make addition to lands. In everything except in the change of station grounds and buildings, the lessee was to be the actor and to furnish the funds; in regard to that, the lessor was to be the actor, — was to sell, with the consent of the lessee, the old, and to procure the new, and to furnish the means, from the proceeds of sales or from its own bonds, the interest on which the lessee was to pay. It was to purchase and grade the land, erect the buildings, and lay the tracks, and "the new track, grounds, and buildings," not the land when purchased, were to come under the lease.

Land purchased by the lessor, which was not connected with the road, but was intended for future use after it should be fitted and prepared, would not be land on which the road was located, and would be no part of the road. It would be land procured for the purpose of changing the road, and until the change should be made, and the new tracks put in connection with the road, it would not become a part of it. In this case the land was not purchased, but was taken, and preparations for a change of location were made, by authority and direction of the

statute. It does not appear that it was done under the lease, or with the assent of the lessee. The land, having been taken under the statute, was being graded and prepared for the new location and station required by the statute, when the damage was done; it was in possession of the lessor, there were no tracks or buildings upon it, and it was not connected or used with the railroad. It remained in the possession of the lessor until the tracks, grounds, and buildings were completed, ready for use, and then "the premises were turned over" to the lessee's successor. We are of opinion that they did not come under the operation of the lease until the possession was thus taken by the lessee, and that the rulings asked for by the respondent were properly refused.

The only other exception is to the admission of evidence that a demand to build the retaining wall was made by the lessee upon the lessor. The exceptions state that this evidence was admitted *de bene*, and was not afterwards referred to by court or counsel. The amount of damage claimed by the petitioner was the expense of building the wall. We do not see how the evidence was material. If it had been contended for the respondent, that, after the lessee had accepted the premises without the wall, the lessor had no interest in it, or that for any reason it was necessary to show a demand for the wall by the lessee, it might have been competent. But it does not appear that any demand was necessary. As it was, it could have had no effect unless to forestall such an argument. It seems to have been in fact, and to have been regarded by the court, as immaterial when offered, but as something which might, in some possible aspect of the case, become material, and to have been no further regarded by any one. It was not received as an expression of the opinion of the officer who made the demand that a wall was necessary. It was immaterial evidence, by which the respondent was not injured.

Exceptions overruled.

COMMONWEALTH vs. JEREMIAH MURPHY.

Plymouth. October 16, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Sale of Intoxicating Liquors — Evidence for Jury.

At the trial of a complaint for unlawfully keeping for sale intoxicating liquors, there was evidence that the defendant was heard to tell a companion at an agricultural fair to button up his coat; that the defendant then stationed himself behind one of several carriages, and his companion went with others between them; that the companion took from his pocket a tumbler and a bottle, such others drinking therefrom, and one of them giving to him what he called a half-dollar; that the defendant then secured an addition to the party, and the transaction was repeated; that the defendant and his companion did not drink on either occasion; that the companion was then arrested, and after he was taken away one of those who drank was seen to hand something to the defendant; that at the lockup the companion, upon being searched, was found to have on his person a tumbler and several bottles containing intoxicating liquors; that the defendant came to the lockup, asked what his companion was arrested for, and got in the way of the officers, who took his name, as they said they might want him "for the same purpose"; and that the defendant testified at the trial of his companion that he contributed to the purchase of the liquor, and filled the bottles with it in his own room at a distance from the fair grounds. *Held*, that there was evidence tending to show that the defendant was guilty of the offence, and the case was properly submitted to the jury.

COMPLAINT for the unlawful keeping for sale of intoxicating liquors. At the trial in the Superior Court, on appeal, before *Staples, J.*, evidence was introduced tending to prove the following facts.

The defendant and one McDonald, with others, were seen walking together on the Agricultural Fair grounds in Brockton, when Murphy was heard to say to McDonald, "You damn fool, button up your coat." The defendant then stationed himself behind one of several carriages there standing, while McDonald, with the others, went in between them; and McDonald took a tumbler and a bottle from his pocket and passed them to one of those with him, and all of them drank except McDonald and the defendant; after which, one of those who drank gave McDonald what he called a half-dollar. Subsequently the defendant and McDonald, with others, one of whom joined them upon being

spoken to by the defendant, repeated the same operation. Again neither the defendant nor McDonald drank anything. McDonald was then arrested by a police officer and taken away, after which one of those who had drunk was seen to hand something to the defendant, but what it was did not appear. At the lockup McDonald was searched, and a tumbler and three bottles containing intoxicating liquors were found in his pockets. While McDonald was being searched, the defendant came in and wished to know what McDonald was arrested for, got in front of the officers, and was pushed out of the way, and his name was taken by them, as they then said he might be wanted "for the same purpose." At the trial of McDonald, the defendant testified that he was one of the parties who contributed to buy the liquor, and filled the bottles with it out of a jug at his room, three quarters of a mile distant from the fair grounds.

The judge refused to rule, as requested by the defendant, that there was no evidence to warrant a conviction, and submitted the case to the jury, under instructions not otherwise excepted to.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Brown, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

BY THE COURT. There was evidence tending to show that the defendant was guilty of the offence charged. The case was properly submitted to the jury.

Exceptions overruled.

COMMONWEALTH vs. MYRON McDONALD.

Plymouth. October 16, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Sale of Intoxicating Liquors — Accomplice — Evidence.

At the trial of a complaint for unlawfully keeping for sale intoxicating liquors, after evidence that the defendant and a companion were acting together as accomplices in such sales of liquor, evidence was admitted of the acts of such companion after the arrest of the defendant, but the jury were instructed to disregard it if they were not satisfied that the two were acting together as confederates in a common enterprise. *Held*, that the evidence was rightly admitted.

COMPLAINT for the unlawful keeping for sale of intoxicating liquors.

At the trial in the Superior Court, on appeal, before *Staples, J.*, evidence was introduced tending to prove that the defendant and one Murphy, with others, were seen together on the Agricultural Fair grounds in Brockton; that Murphy stationed himself behind one of several carriages there standing, while the defendant, with others, went in among them; that the defendant took a tumbler and a bottle from his pocket, and handed them to one of those with him, and thereupon all of them drank except the defendant; that after they had drunk, one of them handed to the defendant what was thought to be a silver half-dollar, which the defendant took and put in his pocket; that subsequently Murphy was seen to speak to three or four persons, and the transaction was repeated; that the defendant and Murphy did not drink anything on either occasion; that after the second occasion the defendant was arrested and taken to the lockup, where he was searched, and bottles containing whiskey were found upon his person. A witness was asked, against the objection of the defendant, as to what took place immediately after the defendant was arrested and taken away, and was permitted to reply that he saw one of the persons that had been drinking among the carriages give something to Murphy, who took it, but that he did not know what it was.

The judge instructed the jury not to consider the evidence of what occurred after the defendant was taken away, unless

they found that the defendant and Murphy were acting together in regard to what was done between the carriages, and were confederates in a common enterprise.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Brown, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

BY THE COURT. There was evidence showing that McDonald and Murphy were acting together as accomplices in keeping intoxicating liquor with intent to sell it illegally. The court therefore properly admitted evidence of the acts of Murphy immediately after the arrest of the defendant. The rights of the defendant were carefully guarded by the instruction that the jury should disregard the evidence unless they were satisfied that the parties were acting together as confederates in a common enterprise.

Exceptions overruled.

COMMONWEALTH vs. JOHN MOORE.

Plymouth. October 16, 1888. — October 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Intoxicating Liquors — Common Nuisance — Time — Evidence.

At the trial of a complaint for keeping and maintaining a common nuisance, to wit, a tenement used for the illegal sale and keeping for sale of intoxicating liquors, from May 1 to September 18, evidence was admitted of acts of the defendant tending to show that he kept the tenement on September 18. *Held*, that the evidence was competent, even if that date was not included in the time alleged, as tending to prove that he kept it during that time.

Evidence was also introduced at the trial, that the tenement was a dwelling-house consisting of several rooms; that many had been seen going into the house after dark, some of whom came out drunk; that, upon a search of the premises, empty beer bottles, a jug and a bottle, with a little whiskey in each, and a small glass wet with whiskey, were found in different rooms; that the defendant, who had been seen around the premises, was on that occasion sitting by the stove, and several men were standing around, two of whom were under the influence of liquor. *Held*, that there was evidence of the guilt of the defendant to be submitted to the jury.

COMPLAINT for keeping and maintaining a common nuisance, to wit, a certain tenement in Brockton, used for the illegal keep-

ing and illegal sale of intoxicating liquors, on May 1, 1887, and "on divers other days and times between that day and the 18th of September," 1887.

At the trial in the Superior Court, on appeal, before *Staples, J.*, there was evidence tending to prove that the tenement was a dwelling-house with four rooms, each room about twelve feet square; that it was situated on a private way in Brockton; that a good many persons had been seen going into and out of the house nearly every night; that, about September 1st, three men were seen to come out of the house drunk; that the defendant had been seen, prior to September 18th, around the building, but had not been seen to go into it; that, on July 24th, the house was duly searched upon a search-warrant; that there were found eighteen empty beer bottles in the kitchen, a jug and a bottle, each with a little whiskey in it, and a small glass wet with whiskey, in other rooms; that at the time of the search the defendant was sitting by the stove in one of the rooms; and that there were nine men there standing around the room, two of whom were under the influence of liquor.

Evidence was also introduced, that, on September 18th, officers entered the house with a search-warrant; that, when they went in, the defendant stood in the middle of the floor with a pint bottle in one hand and a glass in the other, with a group of men around him; that an officer attempted to take the bottle, but the defendant put it behind him, when one of the group took it and threw it out of the window; that there was a little whiskey in the glass held by him; that, during September 18th, the defendant had been seen to leave the premises, and to return with a bottle in his pocket and a package under his arm; that he was then seen to take a bottle out of his pocket three times, and to give liquor to people in the house; that the defendant, upon his arrest on that day, was asked if he desired to lock up the house; and that the defendant thereupon told the men present that they must go out, and also told another person to fasten the windows, and gave such person the key of the house with which to lock it up.

The defendant contended that the evidence as to what occurred, and was seen to occur, on September 18th, was inadmissible, and asked the judge so to rule, as well as to rule that

there was not sufficient evidence to go to the jury. The judge refused so to rule, and instructed the jury that the evidence as to September 18th was not competent except upon the question as to who kept the place during the time alleged, and that upon the question as to the use of the tenement as charged it was not to be considered.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Brown, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

BY THE COURT. Evidence of the acts of the defendant tending to show that he kept the tenement on September 18th, was competent, even if that date is not included in the time alleged in the complaint. It has some tendency to prove that he kept it during the time alleged.

There was sufficient evidence of the guilt of the defendant to require the court to submit the case to the jury.

Exceptions overruled.



JOHN DORR & others vs. NATHANIEL P. LOVERING & others.

Suffolk. January 30, 1888. — October 22, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Devise in Trust — Remoteness.

A testator devised certain real estate to trustees, in trust, to pay the income thereof to his daughter N. during her life; on her decease, to pay the income of a certain portion of such estate to her daughters A. and M. during their lives, and, upon their decease, to convey "said estate" in fee to the heirs at law of A. and M.; upon the decease of N., to pay the income of the remaining portion of the estate "to her children" during their lives, and "as the children of N. successively decease" such remaining portion was "to be conveyed in fee to the heirs at law of all the children of N." At the death of the testator, N. had children living, and it was possible that she might have a child born afterwards. *Held*, that the devise over to the children of N. was of distinct shares, and that the limitation over to the heirs at law of such children as were living at the death of the testator was not void for remoteness, and that the possible partial invalidity of the devise in case of an after-born child to N. would not defeat the devises to such children.

BILL IN EQUITY, filed April 19, 1887, by grandchildren and lineal descendants of deceased grandchildren of Joseph Lovering, against the trustees under his will and the heirs at law of Ann L. Gay, to compel the distribution of her share in a trust estate created by the will.

The case was heard, upon the bill and answers, before *C. Allen, J.*, who ordered a decree for the plaintiffs; and the heirs at law of Ann L. Gay appealed to the full court. The facts appear in the opinion.

J. C. Gray, for the heirs at law.

A. Russ, (*D. A. Dorr* with him,) for the plaintiffs.

MORTON, C. J. Joseph Lovering, by the nineteenth article of his will, gave to trustees "all the rest, residue, and remainder of my estate, real and personal, of every nature and description," in trust, to pay the net income to his five children during their respective lives, and upon the further trust, on the decease of such five children successively, to convey in fee the same residue and remainder to and among his grandchildren and the lineal descendants of his deceased grandchildren.

By the thirteenth clause of his will, which was duly admitted to probate on December 19, 1848, he devised to the same trustees two stores in State Street, a house in Tremont Street, and a house in Hollis Street, all in Boston, "in trust, to take the rents, profits, and income of said real estate, and, after deducting all necessary charges and expenses attending the care and management of said estates, to pay the net balance of such rents and profits to my said daughter, Nancy Gay, during her life, on her personal receipt or written order only, half-yearly, or oftener if convenient to my trustees. And upon this further trust, upon the decease of said Nancy, to pay over to her daughters, Ann L. Gay and Martha Gay, the net rents and income of said estate in Hollis Street, half-yearly, or oftener if convenient to said trustees, during their lives; and on the decease of said Ann and Martha successively, to convey in fee, or, in case said estate should be sold, pay over and distribute the proceeds to and among the heirs at law of said Ann and Martha. And on this further trust, upon the decease of said Nancy Gay, to pay the net income of said two stores in State Street, and of said house in Tremont Street, to her children, half-yearly, or oftener

if convenient to said trustees, during the lives of said children. And as the children of said Nancy shall successively decease, said stores in State Street, and said house in Tremont Street, are to be conveyed in fee, or, in case the same be sold, the proceeds are to be paid and distributed to and among the heirs at law of all the children of said Nancy; that is to say, that, as said Nancy's children shall successively decease, a portion of said estate, or the proceeds, are to be conveyed or distributed to and among the respective heirs at law of each child so deceasing, said Nancy's grandchildren to take in right of representation of their deceased parents."

The latter clause of the will has been twice before the court. In *Lovering v. Worthington*, 106 Mass. 86, it was held that the limitation of life estates to the children of Nancy Gay was not void for remoteness. In *Lovering v. Lovering*, 129 Mass. 97, the precise question now raised was decided. It was held that the limitation over to the heirs of George H. Gay, a son of Nancy, was void for remoteness. But the only question argued in that case was whether the devise of life estates to the children of Nancy Gay opened to let in children born after the death of the testator. The counsel for the grandchildren conceded that, if after-born children were included in the devise, the limitation over to the heirs of the children of Nancy Gay was void for remoteness. The court therefore did not discuss this question, but, accepting the concession of the counsel, considered only the questions argued by him.

Under these circumstances, we feel bound to consider the question now raised as if it were a new question.

The general rule is well settled, that, in judging of the question of the remoteness of an executory devise, we must take our stand at the death of the testator, and that such devise is void unless it takes effect *ex necessitate*, and in every possible contingency, within the period of a life in being and twenty-one years afterwards. *Hall v. Hall*, 123 Mass. 120, and cases cited.

In the case at bar, it was possible, at the death of the testator, that Nancy Gay might have a child born afterwards, and that all her children living at the death of the testator might die during her life. If the will is to be construed as giving life estates to the children of Nancy Gay who might be living at

her death, it might result that the after-born child would be the only child then living, and would take a life estate in the whole of the property; and in that event, the limitation over to the heirs at law of such after-born child would be void for remoteness, because it would not take effect until the end of the life of its parent, — a life not in being at the death of the testator. If this was so, it would seem that the whole devise would be void for remoteness under the rule we have stated.

But, upon careful consideration, we are of opinion that the will cannot be thus construed, and that the case falls within the decision in *Hills v. Simonds*, 125 Mass. 536. In that case the will of Jonathan Simonds devised the residue of his estate to trustees, to pay the income to his son for life, and upon his death without issue to divide the estate "among my nephews and nieces as follows, to wit, the children of my brother Joshua, my brother William, my sister Martha Merriam, and my sister Elizabeth Parker, during their natural lives, and after their decease to be equally divided among their children or their legal representatives." The will was before the court for adjudication several times. In *Simonds v. Simonds*, 112 Mass. 157, and *Simonds v. Simonds*, 121 Mass. 191, it was held that the son took an estate for life, and that the devise over of a life estate to the nephews and nieces was not void for remoteness. In *Merriam v. Simonds*, 121 Mass. 198, it was held that the nephews and nieces of the testator, who were included in the description, took estates which vested at the death of the testator; that, at the termination of the first life estate, each of those then living was entitled to a life estate in possession in his or her share of the estate; that the children or legal representatives of those who had died during the first life estate were entitled to an absolute estate in the share of their ancestor; and that thereafter, upon the death of each life tenant, his or her share was to be divided among his or her children or legal representatives.

After these decisions came the case of *Hills v. Simonds*, *ubi supra*, in which the question of the validity of the devise over to the children or legal representatives of the nephews and nieces was for the first time raised. The case was presented of a devise of a life estate to the testator's son, with a limitation over of life estates to certain described nephews and nieces, and

with further limitations over, not of the whole estate to a single class of persons, but of the particular and separate share of each nephew or niece to his or her children or legal representatives. Construing this will as at the death of the testator, it is not possible that the whole estate, by virtue of the ultimate limitation over, could vest at too remote a period in the children of an after-born nephew or niece. Assuming that the devise to nephews and nieces would open to let in after-born nephews and nieces, yet the share which each is to take must be ascertained at the end of lives in being at the death of the testator; at the death of the first life tenant, each nephew and niece then living had a vested life estate in a defined independent share of the estate, and the children of those who had died had an absolute estate in their ancestor's share. The shares of each nephew and niece then became ascertained, and distinct and separate from the shares of the others, and separate and independent limitations over attached and applied to each share. We think it was correctly held that the ultimate limitation over, which applied to the respective shares of the nephews and nieces who were living at the death of the testator, was not void for remoteness, as the remotest period at which such devises over must take effect is the end of the respective lives of such nephews and nieces. We have carefully reconsidered this case, because, as we have before stated, the case at bar cannot be distinguished from it.

Mrs. Nancy Gay, who died on February 12, 1870, had eight children living at the death of the testator, and none were born to her afterwards. We will suppose, for the purposes of the discussion, that she had had a son born after the testator's death. We are of opinion that the living children took life estates expectant upon their mother's death, which vested at the death of the testator, and in the case of the after-born son his estate would vest at his birth. The general rule is, that, where a will gives a life estate to one, with a devise over, either for life or in fee, to a definite class of persons, the presumption is that those take who constitute the class at the death of the testator, unless the will shows a different intention. *Merriam v. Simonds*, *ubi supra*, and cases cited. *McArthur v. Scott*, 113 U. S. 340. There is nothing in this will to take the case out of this rule. On the contrary, if we were to adopt a different construction, the result would

be, that, in case any of the children of Nancy Gay should die before their mother, leaving children, such children would take nothing, a result which would defeat the clear intention of the testator.

It has already been decided, that, whether there are after-born children or not, the devise of life estates to the children of Nancy Gay is valid. Upon the death of Nancy Gay, the precise share of each child is ascertained and determined. Now, what are the limitations over upon the termination of these life estates? The will provides that, "as the children of said Nancy shall successively decease, said stores in State Street and said house in Tremont Street are to be conveyed in fee, or, in case the same be sold, the proceeds are to be paid and distributed to and among the heirs at law of all the children of said Nancy"; if the provision stopped here, a question of difficulty would be presented, but to explain what is meant, the will proceeds: "that is to say, that, as said Nancy's children shall successively decease, a portion of said estate, or the proceeds, are to be conveyed or distributed to and among the respective heirs at law of each child so deceasing, said Nancy's grandchildren to take in right of representation of their deceased parents."

This provision does not contemplate any survivorship among the life tenants, or that the final division among the heirs is to be postponed until the death of the last life tenant. On the contrary, it clearly means that, upon the death of each life tenant, his share shall be divided among his heirs at law, and so on upon each successive death of the children of Nancy Gay. It contemplates that at the death of Nancy Gay each of her children is to have a separate and independent share, and it looks to separate and independent divisions of each share at different times and to different persons. As each child dies, his heirs are to take; they may be his children, or his brothers and sisters, if he has no children. Upon their successive deaths, their heirs must be different persons. Thus the devise over is not a devise to a single class, of which the issue of an after-born child of Nancy is a member, to take effect at the end of a life not in being at the death of the testator.

The intention of the testator cannot be carried out except by regarding the provision as separate and distinct devises to differ-

ent classes, which take effect at different times, upon the respective deaths of the life tenants. The legal heirs of each child, upon his death, take his share of the estate; and as the devise to the heirs takes effect at the death of their ancestor who had the life estate, it follows that in the case of all the children who were living at the death of the testator the devise over is not void for remoteness. In the case supposed, of the after-born son, the devise over would be invalid; but this would not affect the distinct devises in favor of the heirs of his brothers or sisters, because the estates devised to them must vest within the period prescribed by law. We are compelled to the conclusion that the concession of counsel and the decision of the court in *Lovering v. Lovering*, *ubi supra*, to the effect that the gifts over to the heirs at law of the children of Nancy Gay were void for remoteness, are erroneous. *Cattlin v. Brown*, 11 Hare, 372. *Griffith v. Pownall*, 13 Sim. 393. *Wilkinson v. Duncan*, 30 Beav. 111. *Storrs v. Benbow*, 3 DeG. M. & G. 390. *Pearks v. Moseley*, 5 App. Cas. 714.

The result is, that the heirs at law of Ann L. Gay, who died on November 8, 1886, are entitled, under the thirteenth clause of the will, to the property in which she had a life interest under the clause we have discussed, being her share of the property originally consisting of the stores in State Street and the house in Tremont Street.

Decree accordingly.

E. H. NEEDHAM vs. JOHN A. THAYER.

Hampshire. September 18, 1888. — October 22, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Constitutional Law — Defence to Action on Judgment in Personam against Non-resident — Writ of Error.

Under the fourteenth article of the Amendments of the Constitution of the United States, a defendant in an action brought here upon a domestic judgment in *personam* against him may set up in defence, that he was at the time the original action was brought a non-resident, and neither was served personally with process nor appeared therein; and he is not obliged to resort to a writ of error to invalidate the judgment.

CONTRACT on a judgment recovered by the plaintiff, on March 7, 1874, in the Superior Court. Writ dated May 16, 1887. The answer alleged, that the plaintiff ought not to maintain the action against the defendant "upon said judgment, because he had no notice of said suit in which said judgment was obtained; that at the time of the service of said writ in said last-named action the defendant was an inhabitant and resident of the State of Connecticut, and had no notice of the commencement of said action, or of its pendency in court."

At the trial in the Superior Court, without a jury, before *Dunbar, J.*, after evidence that the judgment remained unsatisfied, the defendant offered evidence tending to show that at the time the original action, resulting in the recovery of the judgment, was commenced, he was not a resident of this Commonwealth, but was a resident of the State of Connecticut; that no service of the writ in that action was made as required by law, and no notice was given to him of such action; that such action was brought without his knowledge, and that he had no notice of the same until after the commencement of this action; and that the judgment in the original action was obtained against him by default. The judge, upon objection by the plaintiff, excluded the evidence, and found for the plaintiff; and the defendant alleged exceptions.

D. W. Bond, for the defendant.

E. B. Maynard & C. C. Spellman, for the plaintiff.

MORTON, C. J. The question of the validity of a judgment rendered by a court of this State against a defendant who was not a resident of the State, and who was not served personally with process within the State, was considered in *Eliot v. McCormick*, 144 Mass. 10. In that case this court, following the decisions in the Supreme Court of the United States, held that such judgment contravened the fourteenth article of the Amendments of the Constitution of the United States, and was invalid, and would be reversed upon a writ of error.

The case at bar presents the question, whether, in a suit in this State upon such a judgment, the defendant may show by plea and proof that it is invalid. The recent cases in the Supreme Court of the United States go upon the ground, that a judgment *in personam* against a person who is not a resident of

the State, who has not been personally served with process, and who has not appeared, is wholly void, and that no suit can be maintained on it, either in the same or in any other court. *Pennoyer v. Neff*, 95 U. S. 714, 732. *Freeman v. Alderson*, 119 U. S. 185. The court has no jurisdiction, and its judgment has no force, either in the State in which it was rendered, or in any other State. This being so, the judgment cannot be enforced by a suit upon it, and the non-resident defendant cannot be deprived of his right to show by plea and proof, if such suit is brought, that the judgment is void, without an abridgment of his privileges and immunities, to protect which was the object of the fourteenth article of Amendment. To compel him to resort to our courts by a writ of error, in which he must file a bond if he would obtain a stay of the execution, is to impose a burden upon him, and thus to abridge his privileges and immunities. It has been held, in many cases, that a domestic judgment cannot be impeached by plea and proof in a suit brought upon it, because the proper remedy is a writ of error. *Hendrick v. Whittemore*, 105 Mass. 23, and cases cited. But while a State may make laws binding its own citizens, requiring them to resort to a writ of error, it cannot so bind citizens of other States.

The case of *McCormick v. Fiske*, 138 Mass. 379, seems opposed to our views. But in that case the question of the effect of the fourteenth article of Amendment was not raised or suggested to the court, and therefore was not considered. In the case at bar, the effect of that amendment is involved. The defendant's answer sets up that, at the time when the original suit was brought against him, he was a non-resident, and that no service was made upon him. We are of the opinion that he had the right to impeach the judgment by proof of these facts, and that the ruling rejecting such evidence was erroneous.

Exceptions sustained.

COMMONWEALTH vs. Z. N. LE CLAIR.

Worcester. October 1, 1888. — October 22, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Intoxicating Liquors — Complaint alleging future Offence — Clerical Error —
Amendment — Arrest of Judgment.*

The copy of a complaint transmitted on appeal to the Superior Court by a trial justice was subscribed and sworn to on January 12, 1888, and alleged that the defendant kept and maintained a common nuisance, to wit, a tenement used for the illegal sale and keeping of intoxicating liquors, from August 1, 1887, to August 1, 1888. Copies of the warrant and recognizance each recited the charge in the complaint as keeping the nuisance from August 1, 1887, to January 12, 1888. Held, on a motion in arrest of judgment, that the Superior Court had no jurisdiction to try the offence alleged, but that, as the copy of the complaint, if erroneous, was amendable, judgment would not be arrested and the defendant discharged, but the verdict would be set aside and a new trial ordered to further such amendment.

COMPLAINT to a trial justice, for keeping and maintaining a common nuisance, to wit, a certain tenement in Brookfield used for the illegal sale and keeping of intoxicating liquors.

In the Superior Court, on appeal, the defendant, after verdict and before judgment, moved in arrest of judgment, on the ground that the complaint covered a future period of time, and did not allege an offence that had been committed. The motion was overruled; and the defendant appealed to this court. The facts appear in the opinion.

J. R. Thayer, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

MORTON, C. J. When an appeal is taken from the sentence of a trial justice in a criminal case, it is the duty of the justice to transmit to the Superior Court a copy of the conviction and other proceedings in the case. Pub. Sts. c. 155, § 60. The Superior Court can try the defendant for the offence set out in the copy of the complaint transmitted to it, and for no other offence. If there is an error in the copy, the trial justice may transmit an amended and corrected copy at any time before the trial in the Superior Court. He cannot do so afterwards, so as to make good the conviction of the defendant. *Commonwealth v.*

Foynes, 126 Mass. 267, and cases cited. *Commonwealth v. Kelly*, 12 Gray, 123.

In the case at bar, the copy of the complaint transmitted to the Superior Court, upon which he was tried in that court, charges the defendant with keeping a tenement used for the illegal keeping and sale of intoxicating liquors, "on the first day of August in the year of our Lord one thousand eight hundred and eighty-seven, at Brookfield, in said county, and on divers other days and times between that day and the first day of August in the year eighteen hundred and eighty-eight." The complaint is subscribed and sworn to on the twelfth day of January, 1888. The offence for which the defendant was tried is a single indivisible offence, and the complaint might be supported by proof of illegally maintaining the tenement at any time between January 12, 1888, and August 1, 1888. The allegation of time is essential and material, defining the offence. It is different from the offence of maintaining a tenement from August 1, 1887, to January 12, 1888. *Commonwealth v. Dunster*, 145 Mass. 101, and cases cited.

A man is not liable for an offence until he has committed it. The copy of the complaint upon which the Superior Court acted sets forth no legal offence, and neither the trial justice nor the Superior Court had jurisdiction to try the offence alleged in it. *Commonwealth v. Doyle*, 110 Mass. 103. The defendant's objection is not for any formal defect, but it affects the jurisdiction of the court, and is open to the defendant after verdict. *McQuade v. O'Neil*, 15 Gray, 52. *Commonwealth v. Hinds*, 101 Mass. 209. *Commonwealth v. Galligan*, 113 Mass. 203.

But it does not follow that judgment is to be arrested and the defendant discharged. Upon looking* at the whole record, it seems probable that there was a clerical error in the copy of the complaint transmitted to the Superior Court. The copy of the warrant and the copy of the recognizance each recites the charge in the complaint as keeping a nuisance from August 1, 1887, to January 12, 1888. The proper disposition of the case, therefore, is to set aside the verdict and order a new trial, to enable the trial justice to amend the copy of the complaint. If he should do so, the defendant may be tried anew in the Superior Court. *Commonwealth v. Galligan*, *ubi supra*. *Verdict set aside.*

JOHN W. CORCORAN vs. WESLEY R. BATCHELDER.
SAME vs. SAME.

Worcester. October 3, 1888. — October 22, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Rule of Superior Court — Late Filing of Deposition — Exceptions — National Bank — Declarations of a Party as Evidence — Special Finding of Jury.

A single justice of the Superior Court, who finds that the failure to file a deposition within the time limited by the forty-first Common Law Rule of that court was caused by accident, may, in his discretion, order it to be filed thereafter; and no exception lies to the exercise of such discretion.

A national bank which lends to one person a sum exceeding one tenth of its capital stock against the prohibition of the U. S. Rev. Sts. § 5200, may recover of the borrower the excess of the loan above that limit.

Declarations and statements made by a party to an action to a third person, which were sought to be put in evidence by the former but the nature of which did not appear, and a private letter from the same party to still another person descriptive of the conversation, were held to be properly excluded.

On the issue whether a defendant delivered collateral security to M. as president of the L. Bank, or for his private use, full instructions were given to the jury as to M.'s authority to receive it for the bank, after which the question was put to them, "Did the defendant deliver the security to the L. Bank?" no objection being made to its form, and the jury answered the question in the negative. Held, that the special finding of the jury rendered the instructions immaterial, and that they must have understood the finding to mean that the security was not delivered to M. for the bank.

TWO ACTIONS OF CONTRACT by the receiver of the Lancaster National Bank of Clinton, upon three promissory notes, amounting in all to six thousand dollars, payable to the order of the bank and made by the defendant, each note bearing this indorsement: "Secured by one hundred seventy-three (173) shares Erie Tel. & Tel. Company." The defendant filed in each case an answer containing a general denial, and a special denial of the genuineness of the signatures to the notes, and alleging that the defendant deposited with the bank as collateral security the shares of stock referred to in the indorsement, which were worth more than the amount of the notes, and that the bank had disposed of such shares for a sum sufficient to pay the notes and to leave a balance in its hands. The defendant also filed in each case a declaration in set-off for the proceeds of the shares, to

each of which the plaintiff filed an answer containing a general denial, and averring that such shares, if ever deposited with the bank, had been removed therefrom and disposed of for the defendant's benefit.

The cases were tried together in the Superior Court, before *Mason, J.*, who, after a verdict for the plaintiff, allowed a bill of exceptions, which so far as material appear in the opinion.

B. F. Butler & F. L. Washburn, for the defendant.

P. A. Collins & J. W. Corcoran, for the plaintiff.

MORTON, C. J. Many exceptions were taken at the trial which are waived by the defendant. We shall consider only those which he now relies upon.

The actions are brought upon several promissory notes, amounting to six thousand dollars, given by the defendant to the Lancaster National Bank of Clinton, of which the plaintiff is the receiver. The principal defence set up in the answers and in the declarations in set-off is that the defendant deposited with the bank, as collateral security for the notes, one hundred and seventy-three shares of the capital stock of the Erie Telegraph and Telephone Company, which were of great value, and which the bank had sold and appropriated to its own use.

1. It appeared that the capital of the bank was one hundred thousand dollars, and that at the time when it failed, and when the plaintiff was appointed receiver, the defendant, who was a director, owed the bank for borrowed money the sum of fifteen thousand two hundred dollars, including the notes in suit, and that the defendant had paid nine thousand two hundred dollars of this amount. The defendant asked the court to rule, that, under the U. S. Rev. Sts., § 5200, "the defendant could not in any event be liable to said bank for more than the sum of ten thousand dollars at any one time, and that there never having been a greater liability than ten thousand dollars, which was ten per cent of the whole capital stock of the bank, the plaintiff could not recover more than eight hundred dollars and interest thereon on these suits, or either of them." The court rightly refused this ruling, even if this defence is open to the defendant under the pleadings. It has been held by the Supreme Court of the United States, that the prohibition in § 5200 of the Revised Statutes of the United States does not prevent a bank from

recovering of a person to whom it has lent a sum greater than ten per cent of its capital stock, the excess of the loan over the limit of ten per cent. That decision is binding upon us. *Gold-Mining Co. v. National Bank*, 96 U. S. 640.

2. The defendant objected to the depositions of McNeil, the president of the bank, which were offered in evidence, on the ground that they were not seasonably filed under the 41st Common Law Rule of the Superior Court. They were not filed within fourteen days of the time they were opened, as required by the first part of that rule; but the rule further provides, that, "if by accident or unforeseen cause the party shall be prevented from filing his deposition within fourteen days, the court may allow it to be filed afterwards on motion and sufficient cause shown." It appeared at the trial that the counsel for the plaintiff filed the depositions on the fifteenth day after they were opened, and that he supposed that it was within the fourteen days under the rule. It was competent for the presiding justice to find that the failure to file them within the rule was caused by accident, and he had the right to order them to be filed within his discretion, which we cannot revise.

3. It appeared that the defendant and one Hosmer, who was also a director of the bank, were authorized by the directors of the bank, before its failure, to go to Washington as a committee to consult with the Comptroller of the Currency in regard to the affairs of the bank, and that on his return the defendant, in the presence of the other directors, entered on each of the notes in suit a statement that it was "Secured by one hundred seventy-three (173) shares Erie Tel. & Tel. Company." In order to show that he did this in good faith, it was competent for him to show that it was done by the instruction and advice of the Comptroller. To this extent the court admitted the conversation between the committee and the Comptroller. The defendant contends that he had the right to put in all that was said and done between the committee and the Comptroller, and the defendant was asked as a witness, in substance, what was said about collateral security, and about the condition of some of the notes of the bank secured by collateral, including his own. The court excluded the question. It was not competent for the defendant to put in his own declarations in his own favor. The exceptions do not

show that anything else was excluded by the ruling. They do not show what the declarations or statements sought to be put in were, and therefore fail to show that any testimony which was relevant or material was excluded.

4. The private letter written by the defendant to Paige, another director, describing in brief the interview of the committee with the Comptroller, was properly excluded, under the rule that a party cannot put in his own acts and declarations in the country in support of his case.

5. The judge instructed the jury, upon the question of the authority of the president to receive collateral security for the bank, in substance, that if they were satisfied that McNeil was duly authorized to receive such security for the bank, and that the defendant delivered it to him as to the bank, the defendant had established a delivery to the bank. These instructions seem to be substantially correct, but we need not consider them in detail, as the special finding of the jury has rendered them immaterial. The question put to the jury by the presiding judge was, "Did the defendant deliver one hundred and seventy-three shares of the Erie Telegraph and Telephone Company stock to the Lancaster National Bank of Clinton?" which the jury answered in the negative. The main issue of fact in the case was, whether the defendant delivered the stock to McNeil as president of the bank and for the bank, or to McNeil for his personal use and convenience in furtherance of private speculations in which he, the defendant, and others were embarked. Under the instructions given them, it is entirely clear that the jury understood the finding to mean that the stock was not delivered to McNeil for the bank. The defendant now contends that the question was misleading, as it led the jury "to suppose that the stock must have been placed within the walls of the bank." He made no objection at the time, and it is too late now to object to the form of the question. But no one can read the bill of exceptions without being convinced that it is impossible that intelligent men could be misled in the manner suggested by the defendant. It is clear that the jury understood the question, and answered it intelligently.

Exceptions overruled.

COMMONWEALTH vs. JOHN RUSSELL.

Plymouth. October 16, 1888. — October 22, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Record of Police Court — Arrest of Judgment.

The record of a police court recited, that, upon a warrant issued on an annexed complaint, the defendant was brought before it on January 23, at the only place where it was empowered to sit, and that the case was adjourned, without naming the place where the adjourned court was to be held, to January 26, and again to January 28, when he was tried, found guilty, and sentenced, from which sentence he appealed and was ordered to recognize to prosecute his appeal. The complaint was received and sworn to on January 23, and alleged that the defendant "on" January 1, and thence to January 22, kept and maintained a common nuisance, to wit, a tenement used for the illegal sale and keeping for sale of intoxicating liquors; the warrant was dated January 23; the officer's return thereon was dated January 21, setting forth that he had arrested the defendant "whom I have before the said police court"; and the recognizance recited the charge as keeping the nuisance "from" January 1 to January 22. *Held*, on a motion to arrest judgment, that the record of which the complaint was a part was sufficient, that the error of date in the officer's return, and that of description, if any, in the recognizance, were immaterial, and that the record imported with reasonable certainty that the adjourned court was held where only it was authorized to sit.

COMPLAINT to the Police Court of Brockton, for keeping and maintaining a common nuisance, to wit, a certain tenement used for the illegal keeping and sale of intoxicating liquors.

The copy of the record of the police court, transmitted to the Superior Court, on appeal, so far as material, was as follows: "Commonwealth of Massachusetts. Plymouth, ss. Police Court of the City of Brockton. Commonwealth v. John Russell. On complaint of J. H. Chase, for common nuisance. By virtue of a warrant duly issued upon said complaint, copies of which are hereto annexed, the said defendant is brought before the Police Court of the city of Brockton, at Brockton, in said county of Plymouth, this twenty-third day of January, A. D. 1888, and the said complaint is read to him, and, being asked whether he is guilty of the offence there charged upon him, says that he is not guilty; when the case was adjourned to the twenty-sixth day of January, 1888, at eight o'clock A. M., and the defendant ordered to recognize to the Commonwealth with sureties in the sum of \$500 for his appearance, to answer to

said complaint as aforesaid. And he did so recognize. On the twenty-sixth day of January, 1888, the case was further adjourned to the twenty-eighth day of January, 1888, at which last mentioned date, after hearing divers witnesses, duly sworn to testify the whole truth, and fully understanding the defence of said defendant, it is considered by said court that he is guilty of the offence charged against him."

The record further showed that the defendant was sentenced, from which sentence he appealed to the Superior Court, and was ordered to recognize to appear and prosecute his appeal.

The copy of the complaint annexed to the record was received and sworn to on January 23, 1888, and alleged that the defendant, "on the first day of January in the year of our Lord eighteen hundred and eighty-eight, and on divers other days and times between that day and the twenty-second day of January in the year of our Lord one thousand eight hundred and eighty-eight, at Brockton aforesaid, knowingly, wilfully, and unlawfully did keep and maintain a certain common nuisance, to wit, a tenement in said Brockton, then and on said other days and times there used for the illegal keeping and illegal sale of intoxicating liquors." The warrant issued upon the complaint, and annexed to the record, was dated January 23, 1888, but the return thereon of the officer who served it was dated January 21, 1888, and recited that "I have arrested the within named defendant, whom I have before the said Police Court of the city of Brockton for examination." A copy of the recognizance entered into by the defendant accompanied the copy of the record, and recited that the defendant did "keep and maintain a common nuisance at said Brockton, from the first day of January, A. D. 1888, to the twenty-second day of January, A. D. 1888."

In the Superior Court, the defendant, after verdict and before judgment, moved in arrest of judgment for the following reasons, among others: "1. The record of the judgment and the record of the proceedings transmitted by the police court are inconsistent and contradictory, the copy of the complaint and warrant stating that the defendant was brought before said police court on January the 21st, 1888, and the copy of the judgment stating that he was so brought before said court on January the 23d, 1888, and the recognizance stating the time of maintaining

the alleged nuisance as 'from the 1st day of January, A. D. 1888, to the 22d day of January, 1888,' while the copy of the complaint alleges the time to be 'on the 1st day of January, A. D. 1888, etc.' 2. The record of the judgment does not set forth the offence for which the defendant was put on trial." The motion was overruled; and the defendant appealed to this court.

Asa P. French, for the defendant.

A. J. Waterman, Attorney General, & *H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

MORTON, C. J. The motion in arrest of judgment was properly overruled. The record of the police court has a copy of the complaint annexed, thus making it a part of the record. This is sufficient, as it clearly sets forth the offence for which the defendant was put upon trial. It is plain that the officer who served the warrant made a mistake in the date of his return, but this is immaterial, and it does not contradict or control the record. It is no part of the record. Such an error does not affect the jurisdiction of the court, and furnishes no ground for arresting the judgment.

There is no material difference between the description of the offence in the complaint and the recognizance. But if there were, and the recognizance was therefore void, it would furnish no ground for arresting judgment, as it would not affect the jurisdiction of the appellate court. *Commonwealth v. Leighton*, 7 Allen, 528. This covers all the grounds taken by the defendant in his motion for arresting the judgment upon which he now insists. He argues in this court, that there is a fatal defect in the record of the police court, because it does not show that the defendant was tried at Brockton, the only place at which said court is empowered to sit. If this point is open to him, we do not think it can be sustained. The record recites that the defendant was brought before the court "at Brockton," on January 23, 1888, that the case was adjourned to January 26, 1888, and further adjourned to January 28, 1888, when he was tried. The record purports to be the record of the Police Court of Brockton, held "at Brockton," and imports with reasonable certainty that the adjourned court was held at that place. There is nothing in the record which suggests a different meaning.

Motion in arrest of judgment overruled.

WATUPPA RESERVOIR COMPANY *vs.* CITY OF FALL RIVER.
TROY COTTON AND WOOLLEN MANUFACTORY *vs.* SAME.

Bristol. March 23, 26, 1888. — October 29, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES,
& KNOWLTON, JJ.

*Constitutional Law — Taking of Waters of Great Ponds for Public Uses
without Compensation.*

The Legislature, under the Colony ordinance of 1647, has the right to appropriate, or to grant to a city or town the right to appropriate, the waters of great ponds for domestic purposes, for the extinguishment of fires, and for other like municipal or public uses, without making compensation for damages thereby occasioned to the owners of land on such ponds, or on their outlets, by a substantial lessening of the body of water. W. ALLEN, C. ALLEN, & KNOWLTON, JJ., dissenting.

A company, composed solely of the owners of manufacturing establishments on the only outlet of a great pond, and of the bed and the land on either side of the stream, was incorporated, under the special act of 1826, c. 31, "for the purpose of constructing a reservoir of water" in the pond, by erecting a dam across such outlet, for the benefit of such establishments, and at great expense acquired flowage rights all around the pond, built the dam, raised the water, and continued to maintain its reservoir. The St. of 1886, c. 353, authorized a city to take a certain quantity of the waters of the pond and apply them "to all domestic uses, the extinguishment of fires, and to the public uses of the city," and "without liability to pay any other damages than the State itself would be legally liable to pay." The city duly took the water and proceeded to withdraw from the pond a quantity, which substantially diminished the flow in the stream and caused actual injury to the water power at such establishments. *Held*, that the statute was not unconstitutional in making no provision for compensation to such owners, or as impairing the obligation of a contract between the Commonwealth and the reservoir company. W. ALLEN, C. ALLEN, & KNOWLTON, JJ., dissenting.

TWO BILLS IN EQUITY, filed in the Superior Court on May 23, 1887, to prevent the taking of water from a great pond by the defendant city, as authorized by the St. of 1886, c. 353.* The

* This statute, which was passed on June 30, 1886, is as follows:

"Section 1. The right is hereby granted to the city of Fall River to draw daily from the North Watuppa Pond, not exceeding one million five hundred thousand gallons of water, in addition to the amount of water already condemned by said city under the provisions of chapter one hundred and thirty-three of the acts of the year one thousand eight hundred and seventy-one; and without liability to pay any other damages than the State itself

cases were heard together, by *Mason, J.*, upon the bills, answers, and an agreed statement of facts, and were as follows.

The North Watuppa Pond is a great pond, situated near the city of Fall River, about four miles long and from three fourths of a mile to a mile and a quarter wide, fed by springs beneath it, the surface water from the surrounding land, and a few insignificant streams, and is connected by a narrow passage with the South Watuppa Pond, which is also a great pond. In the body of the North Watuppa Pond there is no perceptible current whatever, but at or near the passage into the South Watuppa Pond there is generally a slight current toward the latter, which at times is reversed if a southerly wind is blowing. Both of these ponds have always been freely used for fishing, fowling, boating, the cutting of ice, etc., by the public. The Fall River, an unnavigable stream, is the only outlet of both ponds, receiving water from no other source, and flows out of the South Watuppa Pond, through the city, into Mount Hope Bay, with an average daily flow of twenty-six million gallons. The descent of the river for a mile and a half of its course is gradual, but in the last half-mile it falls rapidly for one hundred and twenty-nine feet, down a succession of ledges, into the bay. Upon the

would be legally liable to pay. Parties holding in respect of said pond any privileges or grants heretofore made, and liable to revocation or alteration by the State, shall have no claim against said city in respect of water drawn under this grant; but no water shall be taken under this act until the city shall so elect by a vote of its city council, and shall have recorded a copy thereof in the registry of deeds for the northern district of the county of Bristol, and thereupon the quantity of water named in such vote shall be considered as taken and withdrawn from the waters of said pond for the purposes named in this act.

“Section 2. Any privileges heretofore enjoyed in respect of said pond are, so far as they are inconsistent with this act, hereby annulled.

“Section 3. The city of Fall River may apply the water taken under this act to all domestic uses, the extinguishment of fires, and to the public uses of the city; but this limitation shall not affect the use of one million five hundred thousand gallons of water daily, heretofore condemned by said city under the provisions of chapter one hundred and thirty-three of the acts of the year one thousand eight hundred and seventy-one.

“Section 4. Any provisions in said chapter one hundred and thirty-three of the acts of the year one thousand eight hundred and seventy-one inconsistent with the provisions of this act are hereby repealed.

“Section 5. This act shall take effect upon its passage.”

Fall River there are valuable water privileges of an assessed value of \$344,000, which have been utilized for power for many years, belonging to six or seven corporations, whose mills are built over the stream, and who own the bed thereof, and nearly all the land on either side from the head of the fall to tide water.

The Troy Cotton and Woollen Manufactory, one of such corporations, was the owner of the privilege nearest the ponds, and its dam, built by a predecessor in title in 1813, and maintained ever since, raised the natural level of the Watuppa Ponds three feet in height, and held back their waters.

The Watuppa Reservoir Company was incorporated under the special statute of 1826, c. 31,* for the purpose of constructing a reservoir of water in the Watuppa Ponds for the benefit of the manufacturing establishments on the Fall River, the owners of such establishments and privileges being the sole members of the company, and owning all of its capital stock. In 1827 the company built a dam at great expense across the river, below that of the Troy Company, of such height as to flow the pond two feet higher than that dam, and acquired, by the expenditure of large sums of money, rights of flowage as high as its dam all around both ponds, and on both sides of the

* The St. of 1826, c. 31, entitled "An Act to incorporate the Watuppa Reservoir Company," and approved on June 20, 1826, is as follows:

"Section 1. Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, that David Anthony, Nathaniel B. Borden, Oliver Chase, and Bradford Durfee, and their associates, successors, and assigns, be, and they hereby are, constituted a corporation and body politic, by the name of the Watuppa Reservoir Company, for the purpose of constructing a reservoir of water in the Watuppa ponds, so called, in the town of Troy, in the county of Bristol, for the benefit of the manufacturing establishments on Fall River; and for this purpose shall have all the privileges and immunities, and be subject to all the duties and requirements, contained in an act passed on the third day of March, in the year of our Lord one thousand eight hundred and nine, entitled 'An Act defining the general powers and duties of manufacturing corporations,' and the several acts in addition thereto.

"Section 2. Be it further enacted, That said corporation shall have power to make reserves of water in the Watuppa Ponds, so called, by erecting a dam across the outlet of said ponds, in the town of Troy, in the county of Bristol, so as to raise the water in said ponds two feet higher than the dam already erected by the Troy Cotton and Woollen Manufactory in said town of Troy, and to draw off said reserved water in such quantities, at such

river above it, and still continues to maintain the reservoir so formed, and still, with few exceptions, owns and exercises these rights of flowage. The expenses of the company are met by assessments upon its members, who are the successors in title of its original members, for whose benefit exclusively it is maintained, and it derives no income from the waters which it controls.

In 1871 the defendant city, as authorized by the St. of 1871, c. 133, took one and a half million gallons daily of the waters of the North Watuppa Pond for the purpose of providing its inhabitants with pure water, and paid to the owners of the manufacturing establishments on the Fall River over \$50,000 for damages caused by such taking.

In 1886 the Legislature passed an act (St. 1886, c. 353) granting to the defendant city the right to take an additional million and a half gallons daily of the waters of the North Watuppa Pond for all domestic uses, the extinguishment of fires, and for the public uses of the city, without liability to pay any damages other than the State would be legally liable to pay, upon condition that the city, before taking the water, should pass a vote by its city council, and record it in the registry of deeds, stating the quantity to be taken and withdrawn. The city council, on November 1, 1886, passed the requisite

times, and in such manner, as they shall judge to be most for the interest of all concerned.

“Section 3. Be it further enacted, That the said corporation is authorized to acquire, by purchase or otherwise, and to hold and possess such real estate, not exceeding in value ten thousand dollars, and such personal estate, not exceeding in value five thousand dollars, as may be necessary to effect the purposes aforesaid.

“Section 4. Be it further enacted, That the capital stock of said corporation shall be divided into one hundred shares, to be held, assessed, and alienated agreeably to the by-laws of the corporation; and said by-laws shall not be adopted nor amended without the unanimous consent of all the proprietors, anything contained in an act entitled ‘An Act defining the general powers and duties of manufacturing corporations’ to the contrary notwithstanding.

“Section 5. Be it further enacted, That if said corporation, in effecting the purposes aforesaid, shall become liable for damages to any person by flowing, such damage shall be ascertained, and shall be paid by said corporation, according to the provisions of an act entitled ‘An Act for the support and regulation of mills,’ and the several acts in addition thereto.”

vote, which, on November 6, 1886, was duly recorded in the registry of deeds, by which the city took the quantity of water provided for in the act from the North Watuppa Pond, in addition to that taken by it under the act of 1871.

The city thereupon proceeded to draw, and is now drawing, from the pond a portion of the waters so taken, and contends that it has the right so to do without payment of any compensation to the plaintiffs, and that the Reservoir Company and the manufacturing establishments on the Fall River have no rights or privileges in the same as against the city. The amount of water taken under such vote, and actually withdrawn from the pond, substantially diminishes the flow of the stream, and causes substantial injury to the water power at each privilege, and amounts so far in all to about 1,700,000 gallons daily on an average. The city derives a revenue from the water drawn under both statutes, which is applied to the payment of the expense of running the water-works. There has always been a deficit in such expenses, decreasing from year to year, in which is reckoned interest on the outlay, which has been met by appropriations by the city. These appropriations pay for large quantities of water used by the city for extinguishing fires, watering streets, flushing sewers, and in the engine-houses, school-houses, and other public buildings belonging to or used by the city; and the cost to the city of this water is probably less than the rates charged to other consumers.

The judge ordered the bills to be dismissed; and the plaintiffs appealed to this court.

The cases were argued at the bar in March, 1888, and afterwards were submitted on the briefs to all the judges.

J. M. Morton, for the plaintiffs.

J. F. Jackson, for the defendant.

MORTON, C. J. These cases present an important question, not merely on account of the amount involved, but because it affects the rights of the Commonwealth in all the great ponds within its borders.

The St. of 1886, c. 353, § 1, provides: "The right is hereby granted to the city of Fall River to draw daily from the North Watuppa Pond, not exceeding one million five hundred thousand gallons of water, in addition to the amount of water already con-

demned by said city under the provisions of chapter one hundred and thirty-three of the acts of the year one thousand eight hundred and seventy-one; and without liability to pay any other damages than the State itself would be legally liable to pay. Parties holding in respect of said pond any privileges or grants heretofore made, and liable to revocation or alteration by the State, shall have no claim against said city in respect of water drawn under this grant." It is plain that it is the purpose of this statute to assert the right of the State to use the waters of the great ponds for public purposes, and to confer upon cities and towns the right so to use the waters, without making compensation to the littoral proprietors, or to those owning land or water privileges upon any stream flowing from the pond who may be damaged by such use. In the case before us, a natural stream, not navigable, known as the "Fall River," flows from the Watuppa Ponds into tide waters, having a fall in the whole of about one hundred and thirty feet, divided into a succession of water privileges, which are of great value. The city has proceeded, under the statute above cited, to take the waters of the pond, and it is admitted that the water withdrawn substantially diminishes the flow of the stream, and causes substantial injury to the water power at such privileges.

The question is thus presented, whether the State can constitutionally authorize a city or town to use the waters of a great pond for public purposes, without making compensation for damages inflicted upon the owners of land or privileges upon a stream flowing from it. The answer to it must depend upon the nature of the ownership or interest which the State has in the great ponds and their waters, and upon the character and limitations, if any, of the title of such owners of land on such stream. The record in this case merely states that the plaintiffs and the several corporations interested own the land on both sides of the Fall River. It does not show how or when they or their predecessors acquired their titles.

Originally, by grant from the king, the title to all the lands, including the great ponds within their boundaries, was in the Colony of Plymouth and the Colony of Massachusetts Bay, and after the Province charter was, unless previously parted with, in the Province of Massachusetts Bay, and after the Revolution

was in the State. Therefore the predecessor in title of the plaintiffs and of the owners upon the Fall River must have derived their title either from the Colony of Plymouth, or from the Province of Massachusetts Bay, or from the State. There is nothing to show, and it is not claimed, that they have any grant which conveyed to them the title to the ponds or the waters thereof. We believe only one instance is known in which a great pond has been conveyed to individuals, that of Humfrey's Pond, situated in Lynnfield and Danvers. *Commonwealth v. Roxbury*, 9 Gray, 451, 528, note. *West Roxbury v. Stoddard*, 7 Allen, 158.

If an individual owns a pond which has a natural stream flowing from it, the land bordering on which is owned by others by a title in fee without any limitations, it may be that he cannot lawfully fill up the pond, or divert its waters by artificial channels or conduits, to the substantial injury of those who own land on the stream. Where lands border upon a natural stream, each of the proprietors owns the fee to the thread of the stream, and has a right to the natural flow of the stream, subject to the right of every other proprietor to make such use of the water as it passes through his land as is not unreasonably injurious to all the others who with himself have a common right in the stream. Each proprietor has the right to the benefit of it as it passes through his land for all the useful purposes to which it may be applied, and no proprietor above or below has the right unreasonably to divert, obstruct, or pollute it. *Johnson v. Jordan*, 2 Met. 234. *Elliot v. Fitchburg Railroad*, 10 Cush. 191. *Cummings v. Barrett*, 10 Cush. 186. *Tyler v. Wilkinson*, 4 Mason, 897. But where a man owns a pond, and the whole of the stream flowing from it, he would probably have the right to divert and use the waters, although it sensibly diminishes the natural flow of the water in the stream, and if he sells the land on the stream he can reserve to himself the right so to divert and use the waters.

Without going into details, this is a brief statement of the rights of private individuals in ponds and streams. But the right of the Commonwealth is of a different nature.

The Colonies and the Province derived their rights from the king, under their several charters. These charters vested in the grantees not only the right of soil, but also large powers of

government and the prerogatives of the crown in the sea-shores, bays, inlets, rivers, and other property which were held for the use and benefit of all the subjects. As stated by Chief Justice Shaw, the effect of the charters was "to grant to the company both the *jus privatum* and the *jus publicum* of the crown; the *jus privatum*, or title to the land, to be held in fee, parcelled out to corporations and individuals, to be held in fee, subject to the rules of the common law, as private property; and the *jus publicum*, or all those rights of the crown in the sea, sea shore, bays and arms of the sea, where the tide ebbs and flows, in trust for public use of all those who shall become inhabitants of said territory and subjects of said government." *Commonwealth v. Roxbury*, 9 Gray, 451, 483. *Commonwealth v. Alger*, 7 Cush. 53. These rights and powers, both the *jus privatum* and the *jus publicum*, to the extent to which they existed either in the king or Parliament, vested in the Colonial and Provincial governments, and after the Revolution vested in the Commonwealth, including all the prerogatives and rights of the crown, and powers of regulation which had at any time previously been held and exercised by the government of England. *Commonwealth v. Alger*, 7 Cush. 53.

The Colony ordinance of 1641-1647 provides that "every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town or the General Court have otherwise appropriated them. Provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed. The which clearly to determine, it is declared that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further, provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks or coves to other men's houses or lands. And

for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow." Anc. Chart. 148.

This is now generally spoken of as the Colony ordinance of 1647, although parts of it were enacted in different years. It has continued in force through the Provincial and State governments, except that recent legislation has made some changes as to the rights in great ponds, which do not affect the question before us. St. 1869, c. 884 (Pub. Sts. c. 91, §§ 10, 11). St. 1888, c. 318. And it is in force throughout the whole territory of this State, including those parts which were formerly the Colony of Plymouth, Nantucket and Dukes County, and also in Maine, although none of these were under the jurisdiction of the Colony of Massachusetts Bay. *Barker v. Bates*, 18 Pick. 255. *Mayhew v. Norton*, 17 Pick. 357. *Weston v. Sampson*, 8 Cush. 347.

It is true that it did not extend to these places by any positive enactment now known, passed after the union of the Colonies under the Charter of 1692, but it has been universally accepted and regarded as establishing a rule of property throughout the State. As stated by Chief Justice Shaw in *Barker v. Bates*, "Though the rule in question cannot be traced to this source, as a rule of positive law, we are of opinion that it is still a settled rule of property in every part of the State and founded upon a basis quite as firm and immovable; that being a settled rule of property, it would be extremely injurious to the stability of titles, and to the peace and interest of the community, to have it seriously drawn in question." The cases we have cited deal with questions as to the title and rights to the sea-shore; but the laws of Massachusetts from the earliest times have regarded the rights of the public in the great ponds as similar to their rights in the sea-shore. *Drury v. Natick*, 10 Allen, 169, 179. *Commonwealth v. Roxbury*, 9 Gray, 451. *Paine v. Woods*, 108 Mass. 160, 169. The ordinance dealt with the subject of the great ponds as well as with the sea-shore, and it established a rule of property as to their ownership and uses.

Although fishing and fowling are the only rights named in the ordinance, it has always been considered that its object was to set apart and devote the great ponds to public use, and that "with the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, become capable of many others which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arise." *West Roxbury v. Stoddard*, 7 Allen, 158.

Under the ordinance, the State owns the great ponds as public property, held in trust for public uses. It has not only the *jus privatum*, the ownership of the soil, but also the *jus publicum*, and the right to control and regulate the public uses to which the ponds shall be applied. The littoral proprietors of land upon the ponds have no peculiar rights in the soil or in the waters, unless it be by grant from the Legislature. *Hittinger v. Eames*, 121 Mass. 539. *Gage v. Steinkrauss*, 131 Mass. 222.

The power of the Legislature to regulate the rights of fishing, and other public rights, is very broad. Thus it may regulate the time and manner of fishing in the sea within its limits, and may grant exclusive rights of fishing. Instances of the exercise of this power in regard to the great ponds are found in the various statutes leasing such ponds to individuals, which have been held to be valid, although they grant exclusive rights to individuals and exclude others from the exercise of rights to the use of the ponds to which they were before entitled. *Commonwealth v. Vincent*, 108 Mass. 441. *Commonwealth v. Tiffany*, 119 Mass. 300. *Cole v. Eastham*, 133 Mass. 65.

In view of the rights and powers of the State in and over the great ponds, it seems clear that the rights of proprietors owning land either on the pond or on any stream flowing from it cannot be decided by the rules of the common law applicable to ordinary streams. They must be determined with reference to the ordinance and the rule of property established by it, and we are of opinion that they must be regarded as subordinate and subject to the paramount rights of the public declared by the ordinance. All who take and hold property liable to be affected by this rule of property take and hold under and in subordination to it. Each grant carries with it an implied reservation of

these paramount rights, unless the terms of the grant exclude such reservation; so that the grant from the State of land upon a stream flowing from a great pond did not convey an unqualified fee with the right to enjoy the usual and natural flow of the stream, but a qualified right, subject to the superior right of the State to use the pond and its waters for other public uses, if the exigencies of the public for whom it holds the pond in trust demand it.

The case of *Fay v. Salem & Danvers Aqueduct*, 111 Mass. 27, is similar to the case at bar. In that case the defendant was an aqueduct corporation to which the Legislature had granted the right to draw water from a great pond, providing for the payment of damages suffered by any one from the taking of the water. The plaintiff was a littoral proprietor, and claimed that his house was rendered uncomfortable and unfit for the purposes for which it was designed. But the court held that he could not recover damages for this, as he had no right in the pond or its waters, and because, as stated in the opinion, "great ponds are public property, the use of which for taking water or ice, as well as for fishing, fowling, bathing, boating, or skating, may be regulated or granted by the Legislature at its discretion."

In the cases at bar, by the act of 1886, the Legislature authorizes the city of Fall River to draw daily one million five hundred thousand gallons of water from the North Watuppa Pond, and to "apply the water taken under this act to all domestic uses, the extinguishment of fires, and to the public uses of the city." These are all public purposes. The Legislature, acting on the conviction that an abundant supply of pure water to the people is of paramount importance, has deemed it to be a wise public policy to appropriate the waters of this pond to those public uses, without making compensation to those who, owning land on the natural stream flowing from it, have been accustomed to use the water for power as it flows through the stream. Such owners have no vested rights in the waters of the pond, and a majority of the court is of the opinion that the Commonwealth may thus appropriate the waters by its direct action, or may authorize a city or town to do so, without being legally liable to pay any damages to the littoral owners on the pond or on the stream.

As this case depends upon the effect of the Colony ordinance, the decisions in England cannot be of assistance to us. They depend upon the common law, which, as we have said, is changed by the ordinance. The same may be said of the decisions in the other States of this country, most of which are governed by the rules of the common law. In New York and Pennsylvania, it has been held that the rules of the common law do not apply to such great navigable streams as the Hudson, Mohawk, and Delaware Rivers, though they may not be tidal rivers throughout; that the title of such streams is in the government in trust for the people; and that the State may use the waters, or authorize their use, for the purposes for which they are held in trust, without any compensation to riparian proprietors who are damaged by such use. *People v. Canal Appraisers*, 33 N. Y. 461. *Varick v. Smith*, 9 Paige, 547. *Carson v. Blazer*, 2 Binney, 475. *Shrunk v. Schuylkill Navigation Co.* 14 S. & R. 71. *Rundle v. Delaware & Raritan Canal Co.* 14 How. 80.

The industry of counsel has furnished us with references to between two and three hundred water acts passed by the Legislature, including some in which the right to use the waters of great ponds is granted, in most of which provision is made for compensation to those whose mill privileges or water rights are injured. These show that the policy of the State has heretofore been to provide such compensation, but they do not show that the State has not the power to use the waters without compensation. The act we are considering seems to mark a change in the public policy in regard to the waters of the great ponds, as since its enactment several other acts have been passed containing the same provisions as to damages.

The plaintiffs contend that the charter of the Watuppa Reservoir Company operated as a grant to the company of the right to use and control the waters of the Watuppa Ponds for the purposes of power, and for the benefit of the manufacturing establishments on the Fall River, of which it was and is composed. By its charter, this company was granted the "power to make reserves of water in the Watuppa Ponds, so called, by erecting a dam across the outlet of said ponds, in the town of Troy, in the county of Bristol, so as to raise the water in said ponds, two feet higher than the dam already erected by the Troy

Cotton and Woollen Manufactory in said town of Troy, and to draw off said reserved water in such quantities, at such times, and in such manner, as they shall judge to be most for the interest of all concerned." St. 1826, c. 31. We do not think that this can be construed as granting any part of the pond, or any absolute and exclusive right to use and control the waters of the pond. It does not do this in terms or by necessary implication. It is a familiar rule, that grants made by the government are to be construed in favor of the grantor, and this is especially true when they affect the interests of the people which are held in trust by the government. The State is not presumed to grant away such rights or franchises unless it is done in clear terms, or by an implication which is strictly necessary. *Commonwealth v. Roxbury*, 9 Gray, 451. *Martin v. Waddell*, 16 Pet. 367, 411. *Susquehanna Canal Co. v. Wright*, 9 Watts & Serg. 9.

The charter does not grant the pond or the waters in it. The right to use the surplus water is of value, though it is held subject to any future use the State may make of the pond. There is no necessary implication of a grant of the exclusive use of the waters. The charter gives a right to raise the level of the pond, and to use the water as it flows from it, but there is nothing to indicate the intention of the State to grant away the public rights in the pond. Whether it be construed as a revocable license or as a grant of a vested right, the company took and holds its rights subject to the paramount right of the government to use the water for the public purposes for which it was held in trust. For these reasons, a majority of the court is of the opinion that these bills cannot be maintained.

Bills dismissed.

KNOWLTON, J. In these cases I am unable to agree with the majority of the court, and it seems proper that I should state the principles by which I think the decision should be governed. The cases bring in question the right of a riparian proprietor to the use of the water of a running stream. We have no concern with rights in the waters of great ponds except in connection with the contention that, through these ponds, water may be diverted from the streams below without compensation to the riparian owners. The usufruct of water in a watercourse is

inherent in the ownership of the land through which the water flows. It is often the principal element of value in the real estate of which it is a part. Lord Wensleydale says, in *Chesmore v. Richards*, 7 H. L. Cas. 349, 382: "It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner." Chief Justice Shaw, in *Johnson v. Jordan*, 2 Met. 234, 239, uses these words: "Every person, through whose land a natural watercourse runs, has a right, *publici juris*, to the benefit of it, as it passes through his land, to all the useful purposes to which it may be applied. . . . It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel." In *Gardner v. Newburgh*, 2 Johns. 162, 165, Chancellor Kent says: "A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised but by lawful judgment of his peers, or by due process of law. This is an ancient and fundamental maxim of common right to be found in Magna Charta."

The permanent deprivation of this right is a taking or destruction of property, and a diversion of water from a stream, so as to prevent its running in its natural course, is within the constitutional provision for the protection of property. As against riparian proprietors below, not even the State can authorize it without a provision for their compensation. This doctrine rests upon a principle of universal law, recognized from the earliest times, not only in this country and in England, but in continental Europe. It is established by such a weight of authority that it is no longer fairly open to question. *Gardner v. Newburgh*, 2 Johns. 162, 165. *Clinton v. Myers*, 46 N. Y. 511. *Smith v. Rochester*, 92 N. Y. 463. *Pumpelly v. Green Bay Co.* 13 Wall. 166. *Harding v. Stamford Water Co.* 41 Conn. 87. *Cooper v. Williams*, 4 Ohio, 253. *Lee v. Pembroke Iron Co.* 57 Maine, 481. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308. *Arimond v. Green Bay & Mississippi Canal Co.* 31 Wis. 316. *Eaton v. Boston, Concord, & Montreal Railroad*, 51 N. H. 504.

Trenton Water Power Co. v. Raff, 7 Vroom, 335. *St. Helena Water Co. v. Forbes*, 62 Cal. 182. *Hooker v. New Haven & Northampton Co.* 14 Conn. 146.

In Pennsylvania it is held that riparian proprietors take subject to a paramount right in the State to divert water for navigation, and perhaps for other purposes. But the decisions of that State depend in part upon a construction of the original grants, which are said to have extended only to the banks of the great rivers, and they differ from those of England and of most of the other States. *Rundle v. Delaware & Raritan Canal Co.* 14 How. 80. *Shrunk v. Schuylkill Navigation Co.* 14 S. & R. 71. *Wilts & Berks Canal Navigation Co. v. Swindon Waterworks*, L. R. 9 Ch. 451.

But the right of the State to regulate the use by the public of the watercourses within its limits, and to control rivers for that purpose, is not involved in the cases at bar, for the Fall River is in no sense a navigable stream, and the acts complained of have no connection with navigation.

Apart from the Body of Liberties of 1641 and the ordinance of 1647, which I shall presently consider, neither an individual nor the State has any better right to divert water from the Fall River by drawing it from the Watuppa Ponds, than by drawing it from the river itself below the ponds; for the river and ponds are parts of a natural waterway, through which the water passes directly from its sources to the sea. Together they constitute a single system and natural feature of the country, the preservation of whose form and identity is essential to the enjoyment of all the property bordering upon their waters. As against riparian owners below, every reason which forbids the diversion of water from a swiftly flowing stream is equally strong to prevent diversion where the water moves more slowly on its way to its outlet. And this has been distinctly adjudicated in cases of high authority, and, so far as I am aware, without contradiction. *Gardner v. Newburgh*, 2 Johns. 162, 165. *Clinton v. Myers*, 46 N. Y. 511. *Smith v. Rochester*, 92 N. Y. 463. *Hebron Gravel Co. v. Harvey*, 90 Ind. 192. *Dudden v. Guardians of the Poor*, 1 H. & N. 627. *Howe v. Norman*, 13 R. I. 488. *Schaefer v. Marthaler*, 34 Minn. 487. *West v. Taylor*, 16 Oregon, 165. See also *Cummings v. Barrett*, 10 Cush. 186.

It remains to inquire whether the Body of Liberties of 1641 and the ordinance of 1647 changed the common law as to the rights of riparian proprietors upon streams which are supplied in whole or in part by the waters of great ponds. This legislation will be found in the edition of 1672 of the Colonial Laws, which has recently been reprinted in fac-simile by the city of Boston, and it appears under the title of "Liberties Common." Section 2 is as follows: "Every inhabitant who is an householder, shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town or the General Court have otherwise appointed them. Provided, that no town shall appropriate to any particular person or persons, any great pond containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed. . . . And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass or repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow."

The purpose of this legislation, which bears date 1641-1647, seems to have been to secure to all the people certain common rights in the great ponds, and to resident householders similar rights in the bays, inlets, and navigable rivers of the Commonwealth. It contains nothing which, by implication even, seems intended to limit the right of riparian proprietors upon running streams to have the water flow in its natural course. In construing it, we must consider the situation of the country at the time it was passed. A large number of watercourses in this Commonwealth find their sources in great ponds. Private grants must have been made upon some of these streams prior to 1641. Upon the construction of this legislation contended for by the defendant, it would have been unconstitutional as against these grants; not indeed in violation of a written constitution, for there was none; but it would have been contrary to the principles of right which lie at the foundation of all constitutions, and which were then as rigorously regarded as if they had been embodied in a written constitution.

Can it be supposed that our forefathers, zealous as they were in the encouragement of the erection of mills, intended by these provisions to take from individuals, without compensation, rights which they had acquired under previous grants to have water flow through their lands forever? Can it be supposed that, without express reference to the subject, they intended their legislation as an incumbrance upon all lands thereafter to be granted upon watercourses flowing from great ponds, such that the grantees would be liable at any time, at the will of the Colony, to have the character of their property wholly changed, and the beds of their streams left dry? On the contrary, it seems to me that these provisions looked to the preservation of the natural features of the country, and did not even hint at the creation by the Colony of a right in itself to deprive real property not referred to of elements of value naturally belonging to it. They dedicated the great ponds to the public. They gave to all the right of boating and fishing, and they reserved to the Colony the property in the ponds themselves, the better to regulate these and other kindred public rights for the common good.

Undoubtedly the State may use and control these ponds in any reasonable way for the preservation and regulation of these rights. But such use and control must not be inconsistent with the continued existence of the rivers and streams which have been accustomed to flow from them. Doubtless the State, as proprietor, may appropriate them to any other use which does not interfere with the ordinary rights of proprietors upon outlet streams along whose lands the waters flow. But as proprietor the State has no greater right than any other proprietor would have, as against the owners upon these streams; unless indeed its right of regulation and control, for the protection of public rights secured by the ordinance, be deemed an incident of ownership, and not merely of sovereignty. This view seems in harmony with all the numerous decisions which have dealt with the subject. *Commonwealth v. Alger*, 7 Cush. 53. *Cummings v. Barrett*, 10 Cush. 186, 188. *Commonwealth v. Roxbury*, 9 Gray, 451, 477, and 503, note. *West Roxbury v. Stoddard*, 7 Allen, 158. *Berry v. Raddin*, 11 Allen, 577. *Commonwealth v. Vincent*, 108 Mass. 441. *Fay v. Salem & Danvers Aqueduct*, 111 Mass. 27.

Hittinger v. Eames, 121 Mass. 539. *Gage v. Steinkrauss*, 181 Mass. 222. *Rowell v. Doyle*, 131 Mass. 474, 476. *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361. *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267. *Potter v. Howe*, 141 Mass. 357.

Fay v. Salem & Danvers Aqueduct, 111 Mass. 27, which is relied on by the defendant, contains nothing inconsistent with it. In that case the petitioner sought to recover damages under the statute for an injury occasioned by the taking of water by an aqueduct corporation from a great pond, on the ground that his dwelling-house was thereby rendered uncomfortable, and unfit for the purposes for which it was designed. His petition was dismissed on two grounds: one was that such an injury was too remote to be the subject of an assessment of damages under the statute, and the other that he had no private right of property in the pond. It has been held in several of the above cited cases that the public, as well as the landowners along a great pond, may make a reasonable use of it for obtaining water, and for fishing, fowling, bathing, boating, and skating. In other words, every member of the community who can gain access to it has the same rights in it that riparian proprietors commonly have in similar smaller ponds. It was therefore decided that a landowner upon it, whose land comes only to the water's edge, has in it no separate right, but only a right as one of the public. That which would otherwise be his private right is held to be merged in his public rights. See *Lyon v. Fishmongers' Co.* L. R. 10 Ch. 679.

It follows, therefore, that when the Legislature grants those rights to an individual or a corporation, it does not deprive him of property. He is presumed to have bought his land knowing that he could acquire no property in the pond, and trusting to the probable preservation of the public rights for his enjoyment of it. But these decisions do not touch the question whether the owner of land upon a watercourse below can be deprived of water by diversion at the fountain head.

Mr. Justice Gray says in the opinion in the case of *Fay v. Salem & Danvers Aqueduct*, which we are considering, that the Legislature "had full authority to grant the right to an aqueduct corporation to take and conduct the water of the pond for the use of the inhabitants of towns in the neighborhood; making

due compensation for any private property taken for this public use." But the cases I have cited show that depriving a riparian proprietor upon a running stream of the use of water, by diverting it at a pond above, is taking his property, within the meaning of those words in the Constitution. This very case, therefore, recognizes the constitutional requirement of compensation to those whose water rights are taken in this way. If we select from this case and from other cases the particular language most favorable to the defendant's contention, and consider it carefully, it will lead to the same conclusion. It is said that "the pond and the water therein belonged not to the petitioners, but to the public"; and there are other cases which hold that, under the ordinance, the property, or the ownership, or the title to the waters of great ponds and the land under them, is in the Commonwealth. But such language, reasonably interpreted, means that the ordinance secures to the Commonwealth, in great ponds, the same kind of ownership in the water that an individual purchaser of the entire area of a small pond would get by a perfect deed, or by an original grant from the government without restrictions.

If the small pond had no outlet, the purchaser's title to the water in it would enable him to use it in any way he might choose. The water in such a pond would permanently appertain to the locus, and would belong as entirely to the owner of the place in which it accumulated as the land itself by which it was supported. If his pond happened to be a link in a chain through which water made its course from the mountains to the sea, his ownership of the water would give him only the reasonable usufruct of it as it was passing by. He could not consume it, or put it out of visible existence, as he might the solid land within his purchase, because such a use of it would be inconsistent with the right of his neighbors to enjoy their real property in its natural state. In this view, in order to describe the quality of his ownership, it is sometimes said that a riparian proprietor has no title to the water itself of a running stream, but only to the usufruct of it. In a sense, that is true; in another sense, he has a perfect title to the water considered as water of a stream; for the property is real estate naturally moving in a defined course, and he has as good a title as it is

possible to have, in view of the nature of the subject to which his title relates. Merely as an owner, and apart from the exercise of sovereignty, which has no relation to these cases, the Commonwealth could have no better.

No question has arisen in any of the cases which has made it necessary for the court to express an opinion as to the nature of the ownership of the Commonwealth in the waters of great ponds, whether hemmed in by continuous banks, or passing into streams on their way to farms or mills below. The question under discussion in the last-named case was one which would have been pertinent to a pond without an outlet stream, the waters of which, if it had been a small pond, would have been absolutely owned by its proprietor. I believe there is not an expression in any opinion upon this subject which gives countenance to the defendant's contention, unless it be held, as it has never hitherto been held, that, under the ordinance, the ownership or title of the Commonwealth in the waters of great ponds is larger than a private person could obtain by a perfect deed, or by an original unrestricted grant from the State, of a similar small pond, and, as applied to running waters in a pond, larger than is consistent with the nature of the property to which it relates.

In *Fay v. Salem & Danvers Aqueduct*, *ubi supra*, it is said of the water, that "the Legislature, and the respondents acting under their authority, had the right to take and draw it off for the public use." But this was merely a statement of their right in reference to the petitioners, who had no rights in it, and not of a general right to take it without compensation as against riparian proprietors upon a stream below. For not only is the necessity to make compensation for property so taken recognized in a former part of the opinion, but the statute under which the suit was brought provided for it, and the court expressly held, in an opinion by Chief Justice Bigelow in a former suit between the same parties, that the taking of this very water was an exercise of the right of eminent domain. St. 1850, c. 273. *Fay v. Salem & Danvers Aqueduct*, 9 Allen, 577.

It is common knowledge that, from the earliest times, rights in the water of streams flowing from great ponds have been regarded as no less perfect than those in other streams. The

plaintiff's counsel has furnished us a list of two hundred and twenty-three different acts of the Legislature, authorizing municipalities or corporations to supply water for domestic use, passed prior to that under which the defendant now claims. Many of these authorized the taking of water of great ponds, and in none of them is such taking authorized without a provision for the payment of damages. I believe the cases between these parties to be the first in this Commonwealth in which it has been contended that water could lawfully be diverted from the wheels of a mill-owner by taking it from a great pond without the payment of damages.

Against the opinion and practice of our people in relation to rights in water for more than two hundred and fifty years,—against legislative interpretation of the law, frequently repeated and uniform until the passage of this act,—courts should hesitate long before establishing a doctrine which will deprive mill-owners and others of valuable property naturally inherent in their real estate. And, in my opinion, it is reading into the Body of Liberties and the ordinance of 1647 what is not written in them, to say that by them our fathers put an incumbrance upon property bordering upon streams in every part of the Commonwealth. It seems a much more natural and better construction of them, and one consistent with all the authorities, to hold that they were intended to preserve public rights, and not to subject landowners remote from great ponds to the possibility of a change in the natural features of their estates.

The taking of 1,500,000 gallons of water per day for sale to inhabitants of Fall River cannot be authorized as a regulation of public rights in the use of the pond. It is an act of an entirely different character from the direct use of the pond itself by the individuals composing the general public; and it is a substantial diversion of water from the river below. In respect to the principles applicable to it, it cannot be distinguished from a taking of all the water of the stream. The statute which assumes to authorize it declares negatively that the right is granted "without liability to pay any other damages than the State itself would be legally liable to pay," and it makes no provision for compensation to those whose property is taken. In my opinion, it is not in conformity with the Constitution, and

it gives the defendant no rights as against the riparian proprietors upon the river below.

The plaintiffs contend that, as against the charter of the Watuppa Reservoir Company, it is also unconstitutional, as impairing the obligation of a contract. I do not desire to discuss at length this branch of the case, and I do not wish to be deemed to have assented, by silence, to the view of it taken by the majority of the court. It is true that a grant from the sovereign power is to be construed strictly against the grantee. It is true that the sovereignty of the Commonwealth as a ruling power was not impaired by the charter granted to this corporation. It may also be conceded that the rights of property acquired by the corporation under its charter are subordinate to the rights of the public to use the ponds for fishing, boating, bathing, and other kindred purposes, and that the right of the Commonwealth to legislate for the protection and regulation of these public rights was not affected by the act of incorporation.

But the case finds that, acting strictly within the authority of its legislative grant, the corporation has, at great expense, erected a dam at the outlet of the ponds, raised the water, and maintained a reservoir for the purpose of using the water for power. It also finds that, under the same special authority, it has procured a title to lands to be flowed all around both ponds, and it appears that both its property right to this special use of the water granted by the State, and its property in the lands around the ponds, will be taken away, or greatly diminished in value, if the defendant is permitted to proceed and appropriate this water. It is a rule of law that, in transactions in relation to its property, not affecting its sovereignty, the Commonwealth is bound by its contracts, like an individual. In such dealings, it voluntarily lays aside its sovereignty.

The right to regulate the business or repeal the charters of certain corporations, reserved in the act of March 3, 1809, to which this charter is made subject, and the similar right in the broader statute of 1831, c. 81, (Pub. Sts. c. 105, § 3,) have their limitations. In dealing with the latter statute, Chief Justice Shaw, in *Commonwealth v. Essex Co.* 13 Gray, 239, 253, says: "The rule to be extracted is this; that where, under power in a charter, rights have been acquired and become vested, no

amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." I am not aware that this proposition of law has ever been controverted; and there are similar intimations or statements in numerous cases in our reports, and in those of the Supreme Court of the United States. *Commonwealth v. New Bedford Bridge*, 2 Gray, 339, 348. *Commissioners on Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 451. *Parker v. Metropolitan Railroad*, 109 Mass. 506, 508. *Binghamton Bridge*, 3 Wall. 51. *Holyoke Co. v. Lyman*, 15 Wall. 500, 522.

There is great force in the argument, that, by the acts of the corporation under its charter, the contract of the Commonwealth has become executed, and that the rights of the corporation have become vested, so that they cannot be taken away without compensation, — at least so long as the charter remains unrepealed.

I am requested to say that Mr. Justice William Allen and Mr. Justice Charles Allen concur in this opinion.

CHARLOTTE TODD vs. CHARLES W. SAWYER.

Suffolk. March 26, 1888. — June 21, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Devise with Full Power of Disposition — Conveyance in Fee.

A testator devised land to a daughter, "to be kept and retained by her as long as she shall live, and to be disposed of as to her seems proper at her decease," with no devise over. *Held*, that she could convey a good title in fee.

CONTRACT to recover for breach of an agreement by the defendant to purchase land.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, in substance as follows.

Robert Todd, the father of the plaintiff, who died in 1873 seised in fee simple of the land in question, by his will, which

was dated November 6, 1866, and was duly admitted to probate, made various bequests, and a provision for certain expenses, and devised this land to the plaintiff "to her own sole and separate use, to be kept and retained by her as long as she shall live, and to be disposed of as to her seems proper at her decease," without any devise over; and gave all the residue of his estate, in trust, for the use and benefit of all his children.

On November 10, 1887, the plaintiff entered into an agreement in writing with the defendant for the sale and purchase of the land, and on October 15, 1887, duly tendered to him a deed thereof, "being the homestead estate of the late Robert Todd, and devised to me by his last will, with the rights of way appurtenant thereto, hereby conveying to the grantee all my right, title, and interest in and to said premises, . . . in execution of the power to me given in and by said will, and every other power and authority me hereto enabling." The defendant wholly refused then, or at any time, to complete the purchase, or to accept the deed or a conveyance of the premises, on the ground that the deed did not convey to him a fee simple, and that, under the will, the plaintiff did not take, and could not convey, a fee simple of the premises.

If the plaintiff took, under the will, an estate in fee simple, or such an estate, power, or interest as would enable her by her deed to vest in the defendant an estate in fee simple, there was a breach by the defendant of his agreement, and the damages for such breach are three hundred dollars, for which sum judgment was to be entered for the plaintiff; otherwise, judgment was to be entered for the defendant.

H. W. Bragg, for the plaintiff.

R. Bradford, for the defendant.

C. ALLEN, J. At the outset, it is apparent that the plaintiff has at least a life estate. The words, "to be kept and retained by her as long as she shall live," were probably not intended to prohibit an alienation during her life, but were rather expressive of the testator's expectation or wish. But if intended as a prohibition, no legal effect can be given to them, a provision against alienation being void. *Blackstone Bank v. Davis*, 21 Pick. 42. *Gleason v. Fayerweather*, 4 Gray, 348, 351. The words, "be disposed of as to her seems proper at her decease,"

imply a power of disposition either by will or by deed. *Kimball v. Sullivan*, 113 Mass. 345. *Tomlinson v. Dighton*, 1 P. Wms. 149.

There was no devise over. Taking the plaintiff's title, therefore, at the lowest, she has a life estate, with a full power of disposition by deed; and this enables her to convey a good title in fee. And indeed there seems to be no good reason for considering her own title as any less than a fee, especially in view of the provisions of the Gen. Sts. c. 92, § 5, that "every devise of land . . . shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that the devisor intended to convey a less estate." *Cummings v. Shaw*, 108 Mass. 159. *Lyon v. Marsh*, 116 Mass. 232. *Bowen v. Dean*, 110 Mass. 438. *Hale v. Marsh*, 100 Mass. 468. *Whitcomb v. Taylor*, 122 Mass. 243, 248. *Gibbins v. Shepard*, 125 Mass. 541, 543. *Kelley v. Meins*, 135 Mass. 231.

According to the agreement, judgment must be entered for the plaintiff for three hundred dollars.

Judgment for the plaintiff.

MARGARET A. HOLDSWORTH vs. MARY D. TUCKER.

Bristol. October 24, 1888. — October 29, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Point not raised at Trial not open on Motion for a New Trial — Appeal.

On a motion for a new trial, a party cannot avail himself of a point of law which was open to him, but was not raised, at the trial; and no appeal lies from the overruling of such motion.

CONTRACT to recover for breach of a bond for a deed, given, in the penal sum of three hundred dollars, by the defendant to the plaintiff.

Trial in the Superior Court, without a jury, before *Staples, J.*, who found for the plaintiff, and ordered execution to issue to her for \$29.33. Thereafter the plaintiff, being dissatisfied with the amount, filed a motion for a new trial, on the ground then for the

first time set up, that, upon non-performance of a bond given for a specific sum for the performance of an act at a certain time, the finding and damages should be for the penal sum of the bond. The motion was overruled; and the plaintiff appealed to this court.

A. E. Bragg, for the plaintiff.

H. K. Braley, for the defendant, was not called upon.

By THE COURT. The question of law which the plaintiff now attempts to raise was open to her at the trial. As she did not then raise it, she cannot avail herself of it upon a motion for a new trial. No appeal lies from the order of the Superior Court overruling the motion for a new trial. *Whittaker v. West Boylston*, 97 Mass. 273, and cases cited.

Appeal dismissed.

RODNEY F. ASHLEY vs. SAMUEL C. HART & another.

Bristol. October 25, 1888. — October 29, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Master and Servant — Employer's Liability Act — Negligence of Fellow Servant in Use of Proper Appliance.

The St. of 1887, c. 270, § 1, cl. 1, giving to an employee exercising due care a right of action for an injury caused by "any defect in the condition of the ways, works or machinery connected with or used in the business of the employer," arising from the employer's negligence or that of any one in his service intrusted with the duty of seeing that such appliances are in proper condition, does not give a right of action against such employer for the negligence of a fellow servant in handling or using a machine, tool, or appliance, which is itself in proper condition.

A declaration, in an action to recover for such an injury, alleged that the plaintiff and K., both journeyman painters, and employed by the defendant in painting a house, were furnished by him with a hanging stage, each being intrusted with the duty of caring for and fastening to the house his particular end of the stage; that when it became necessary to lower it, according to the usual method of managing such stages, K. had charge of lowering one end and the plaintiff the other; and that, after so doing, K. neglected to fasten his end securely, so that the plaintiff, who was in the exercise of due care, fell and was injured. Held, that the negligence alleged was that of a fellow servant in handling or using a proper stage, and that a case within the statute was not stated.

TORT for personal injuries occasioned to the plaintiff while in the employment of the defendants. Writ dated January 4, 1888. The declaration, as amended, was as follows:

"And the plaintiff says that he was employed by the defendants as a journeyman painter, by the day; that in such employment he was engaged together with one Kempton, also a journeyman painter in the employ of the defendants, in painting a house on the outside; that said employees were furnished by the defendants with a hanging stage, for their use as a support while painting such parts of said house as could not be reached to be painted without a support; that they together were intrusted by the defendants with the duty of seeing that said stage, while being so used, was kept in a proper condition, so as to constitute a safe means of support, each being intrusted with a particular duty thereabouts, to wit, each party was to take care of and make fast to the house his particular end of the stage; that while so engaged in painting said house by the use of said stage, it became necessary for said employees to lower the same, in order to paint the house lower down; that the plaintiff had charge of lowering one end of said stage, and said Kempton the other, that being the usual manner of managing such stages in such employment; that the plaintiff lowered his end and made the same fast; that said Kempton lowered his end, but neglected to fasten it securely, so that in a few moments the fastenings at his end gave way, letting that end suddenly down, and precipitating the plaintiff to the ground and greatly injuring him; and the plaintiff was in the exercise of due care and diligence at the time; and that said accident occurred on the 22d day of November, A. D. 1887, and notice of the time, place, and cause of the injury was given to the defendants within thirty days thereafter."

The defendant demurred to the declaration, on the ground that the cause of the injury stated therein as the only foundation of this action was the negligence of one Kempton, a fellow servant of the plaintiff, in the employment of the defendants.

The Superior Court sustained the demurrer; and the plaintiff appealed to this court.

W. C. Parker, for the plaintiff.

J. Lowell, Jr., for the defendants.

BY THE COURT. The St. of 1887, c. 270, § 1, cl. 1, gives a right of action to an employee, being himself in the exercise of due care, who is injured by "any defect in the condition of the ways, works or machinery connected with or used in the business of the employer," which arose from the negligence of the employer, or of any person in his service who is intrusted with the duty of seeing that the ways, works, or machinery were in proper condition. This so far changes the common law as to give a right of action to a servant who is injured by a defect in the machine, tool, or appliance itself which is furnished for his use, although such defect arose from the negligence of a fellow servant whose duty it was to see that the machine, tool, or appliance was in proper condition. But it does not give a right of action against the employer for the negligence of a fellow servant in handling or using a machine, tool, or appliance which is itself in a proper condition.

The declaration in this case does not allege any defect in the condition of the movable stage furnished by the defendant for the use of the plaintiff and his fellow servant Kempton. It does not directly, or by a fair implication, allege that Kempton, any more than the plaintiff, was intrusted with the duty of seeing that either particular end of the stage was securely fastened to the house. It alleges, that, according to the usual manner of managing such stages, Kempton had charge of lowering one end and the plaintiff of lowering the other, and that Kempton neglected to fasten his end securely. This is simply an allegation of negligence in a fellow servant in handling or using a sufficient and proper stage, and does not state a case which falls within the statute.

Judgment affirmed.

COMMONWEALTH vs. MATTHEW GAGLE.

Essex. November 7, 1888. — November 8, 1888.

Present: MORTON, C. J., FIELD, DEVENS, C. ALLEN, & KNOWLTON, JJ.

Complaint for keeping Intoxicating Liquors — Temporary Separation of Jury — Motion for New Trial.

In a criminal case, it is within the discretion of the Superior Court, after the jury has retired to consider its verdict, to permit a juror who is ill to remain in the jury-room under the charge of an officer, while the others withdraw for supper; and a verdict agreed upon after their return, there having been no discussion of the case during the interval, need not, as matter of law, be set aside.

COMPLAINT for keeping intoxicating liquors with intent unlawfully to sell the same in this Commonwealth. At the trial in the Superior Court, before *Sherman*, J., the jury returned a verdict of guilty. The defendant then filed a motion to set aside the verdict, for the reason that, "after the said cause was committed to the jury, and while the jury were deliberating on the case, the jury were allowed to separate, and did separate without agreeing on a verdict, and afterwards reassembled in the jury-room and deliberated further upon the case, and afterwards agreed upon a verdict."

At the hearing upon the motion the following facts appeared. The jury retired to consider their verdict, and, after being out several hours, the judge ordered supper to be furnished them; and as the officer was about to take the jurors out, one of their number complained that he did not feel well, and did not wish anything to eat or to go out to supper, and requested the judge to allow him to remain in the jury-room. The judge granted the request, and permitted the juror so to remain under charge of a court officer, while the other eleven went out to an eating saloon, some twenty rods from the court-house, and had supper under charge of other officers of the court, being absent from the jury-room from thirty to forty minutes. The officers in charge of the jurors did not hear them talk about the case, although with them all the time during their absence from their room, and upon their return the case was again considered, and a verdict agreed upon.

Upon these facts, the judge overruled the motion; and the defendant alleged exceptions.

H. P. Moulton, for the defendant.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

BY THE COURT. Upon the facts of this case the Superior Court was not required, as matter of law, to set aside the verdict. It was within the discretion of that court to permit one of the jurors to remain in the jury-room under charge of an officer while the other jurors went for their supper. It was a temporary separation for a sufficient cause, which in no way prejudiced the rights of the defendant. *Exceptions overruled.*

COMMONWEALTH vs. MARY MURPHY.

Essex. November 7, 1888. — November 8, 1888.

Present: MORTON, C. J., FIELD, DEVENS, C. ALLEN, & KNOWLTON, JJ.

Intoxicating Liquors — Bringing of Complaint — Statute.

The Pub. Sts. c. 100, § 18, providing that "the mayor and aldermen of cities and the selectmen of towns shall prosecute to final judgment all violations" of the laws relating to intoxicating liquors, is directory only, and does not debar any other citizen from entering complaints therefor.

COMPLAINT by Daniel W. Hammond to the Police Court of Haverhill, for an unlawful sale of intoxicating liquors at Haverhill, on December 26, 1887.

In the Superior Court, on appeal, before the jury was impanelled, the defendant moved to quash the complaint for the following reasons: "1. Because the complainant therein, Daniel W. Hammond, is not the mayor or one of the board of aldermen of the city of Haverhill. 2. Because said complaint is not sworn out by, nor is it on the face of it prosecuted by, the mayor and aldermen of said city of Haverhill, or either of them. 3. Because it does not appear by the complaint that the said Hammond acted originally, or acts now, in behalf of said mayor

and aldermen in prosecuting said complaint. 4. Because for said reasons the court has no jurisdiction."

At the hearing on the motion to quash, before *Bacon, J.*, it appeared that Hammond was not, on December 26, 1887, the mayor or one of the aldermen of said city of Haverhill, nor has he been since, but was at the time of making the complaint, and still is, the city marshal of the city of Haverhill. The judge overruled the motion.

The defendant was then tried, and the jury returned a verdict of guilty; and the defendant alleged exceptions.

B. F. Brickett & C. H. Poor, for the defendant.

A. J. Waterman, Attorney General, *& H. C. Bliss*, Assistant Attorney General, for the Commonwealth.

BY THE COURT. The provision of c. 100, § 18, of the Public Statutes, that "the mayor and aldermen of cities and the selectmen of towns shall prosecute to final judgment all violations of this section," was intended to impose a duty upon the officers named. It is directory only, and does not exclude the right of any other citizen to enter complaints for a violation of the law.

Exceptions overruled.

COMMONWEALTH vs. MCPHERSON.

Essex. November 7, 1888. — November 13, 1888.

Present: MORTON, C. J., FIELD, DEVENS, C. ALLEN, & KNOWLTON, JJ.

Appeal in Criminal Case to Superior Court — Time of Transmitting Certified Copies.

The certified copies to be sent, under the Pub. Sts. c. 164, § 39, and c. 155, § 60, to the Superior Court, on an appeal in a criminal case, by a trial justice or by a police or district court, may be filed at any time during the term then next to be held in the county, and before the trial.

COMPLAINT to the Police Court of Lynn, for keeping and maintaining a common nuisance, to wit, a tenement in Lynn, used for the illegal sale and illegal keeping of intoxicating liquors, from January 1, 1887, to September 27, 1887.

The record showed that the defendant was arrested and brought before that court, and pleaded not guilty; that he was adjudged guilty and sentenced on October 29, 1887; from which sentence he appealed "to the Superior Court next to be holden for criminal business at Salem, in said county of Essex, on the fourth Monday of January next," and was ordered to recognize to appear and prosecute his appeal.

In the Superior Court a general appearance was entered on behalf of the defendant, and the case was put upon the trial list; but before the jury was impanelled, the defendant moved to dismiss the complaint, on the ground that the copies of the conviction, and of the other proceedings in the police court, together with the recognizance entered into by the defendant, were not entered in the Superior Court on said fourth Monday of January, which was January 23, 1888; that such copies were not transmitted to the clerk of that court until January 27, 1888; and that the complaint was improperly upon the trial list. *Bacon, J.*, overruled the motion.

The defendant was then tried, and the jury returned a verdict of guilty; and the defendant alleged exceptions.

J. H. Sisk, for the defendant.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

MORTON, C. J. The statute prescribes no time within which the certified copies of the conviction, and other proceedings in a criminal case, shall be transmitted to the clerk of the Superior Court by the trial justice or the police or district court from whose judgment an appeal is taken. Pub. Sts. c. 154, § 39. Pub. Sts. c. 155, § 60. It is sufficient if they are produced in the Superior Court at any time during the term then next to be held in the county, and before the defendant is called upon to plead. *Commonwealth v. Magoun*, 14 Gray, 398. *Commonwealth v. Wiggin*, 111 Mass. 428.

Exceptions overruled.

GEORGE H. DUPEE vs. FRANK LENTINE.

Suffolk. November 14, 1888. — November 15, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Assault and Battery — Evidence of Provocation.

In an action for an assault, the defendant admitted the assault, but offered evidence to show that his wife had been insulted by the plaintiff several hours before, and that he had just learned that fact at the time of the assault. *Held*, that the evidence was rightly excluded.

TORT for an assault and battery.

At the trial in the Superior Court, before *Mason, J.*, the defendant admitted that he committed the assault, on May 12, 1887, at seven o'clock P. M., by striking the plaintiff, and then offered to show that in his absence his wife had been indecently insulted by the plaintiff at four o'clock P. M. on the same day, and that he had been informed of that fact only ten minutes before the assault, which occurred when he met the plaintiff for the first time thereafter. The defendant contended that this evidence was competent in mitigation of damages, to show his motive in committing the assault and as part of the *res gestæ*, but the judge excluded the evidence.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

D. F. Fitz, for the defendant.

F. Ranney, for the plaintiff.

BY THE COURT. It is the settled rule in this Commonwealth, that, in an action for an assault and battery, previous provocation is not admissible in mitigation of damages. Provocation cannot be shown, unless it is so recent and immediate as to form part of the transaction. In other words, to be admissible, it must be provocation happening at the time of the assault. *Mowry v. Smith*, 9 Allen, 67. *Tyson v. Booth*, 100 Mass. 258. *Bonino v. Caledonio*, 144 Mass. 299.

In the case at bar the court therefore rightly rejected the evidence offered by the defendant to show provocation by the

previous act of the plaintiff in insulting the defendant's wife. It was not a provocation occurring at the time of the assault, and formed no part of the transaction.

Exceptions overruled.

COMMONWEALTH vs. CORNELIUS BUCKLEY.

Plymouth. October 16, 1888. — November 26, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Intoxicating Liquors — Common Nuisance — Tenement.

At the trial of a complaint for keeping and maintaining a common nuisance, to wit, a tenement used for the illegal keeping and sale of intoxicating liquors, there was evidence that the defendant kept as a hotel the second story of a building, in which liquors were found; that a room in the first story, which was unoccupied during a part of the time alleged, during a later portion was kept by him for the sale of such liquors, a dumb-waiter connecting it with a room in the second story, in which liquors were also sold by means of such dumb-waiter. The judge declined to rule that the lower room, because of such partial non-occupation, was a distinct tenement, and that the government must elect which tenement it would rely upon; and instructed the jury that the government must be confined to the offence of keeping one tenement; that a tenement might consist of a single room or contiguous rooms used for a common purpose in a building, and under the occupancy and control, actual or constructive, of one person; that the defendant could be held liable only for maintaining the tenement used as the hotel; and that what rooms were a part of that tenement was for the jury. *Held*, that the defendant had no ground of exception.

COMPLAINT for keeping and maintaining a common nuisance, to wit, a tenement at Brockton, used for the illegal keeping and illegal sale of intoxicating liquors, from May 1, 1887, to December 9, 1887.

At the trial in the Superior Court, on appeal, evidence was introduced tending to show that the defendant kept a hotel, known as the American House, comprising the whole of the second story of a building situated at the corner of Church Street and Montello Street in Brockton; that the first story, with the exception of entrances leading from the side and rear of the building to the second story, was divided into four rooms adapted for business purposes; that on two occasions before October 7, 1887,

the second story was duly searched and intoxicating liquors were found in one of its rooms; that after October 7 one of the rooms on the first floor, which had been unoccupied up to within a few days of that date, was fitted up as a bar-room, and subsequently intoxicating liquors were there kept and sold by the defendant; that this room was connected with a room in the second story by means of a dumb-waiter; and that intoxicating liquors were sold in such room in the second story, being brought up on the dumb-waiter from the bar-room below.

The defendant requested the judge to rule, that, during the time the bar-room was unoccupied, that room and the second story were separate and distinct tenements, and the evidence offered could be applied to but one of them, and that, if the jury should find that the tenements were so separate and distinct during that time, they should acquit, unless the government should elect upon which tenement it should claim a conviction.

The judge refused so to rule, and instructed the jury as follows: "The government must be confined to the charge made, that of the single offence of keeping one tenement. A tenement may consist of a single room or a series of contiguous rooms, constituting the whole or part of a building, under the actual or constructive occupancy and control of the same person, and used for a common purpose. In the present case the government rely upon the fact of the defendant's keeping a hotel called the American House. That is the only tenement for the use of which the defendant can be held liable in this case. What rooms are a part of that tenement is a question of fact for the jury."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Brown, for the defendant.

A. J. Waterman, Attorney General, & *H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

KNOWLTON, J. The only tenement for the keeping of which the jury were permitted in this case to hold the defendant liable, was the hotel called the American House. What rooms were included in that tenement was plainly a question of fact for the jury. There was evidence sufficient to warrant a finding that the room below was a part of it. The fact that this room was not used or occupied during a part of the time named in the

complaint was only a circumstance bearing upon the question whether it belonged to the tenement.

The instructions were appropriate to any view of the evidence that the jury might take, and were sufficient.

Exceptions overruled.

COMMONWEALTH vs. EUGENE BRADY.

Plymouth. October 17, 1888. — November 26, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Intoxicating Liquors — Common Nuisance — Maintaining by Bar-keeper —
Evidence — Cross-Examination.*

At the trial of a complaint for keeping and maintaining a common nuisance, to wit, a tenement used for the illegal keeping and sale of intoxicating liquors, there was evidence that the defendant was employed as a bar-keeper by the proprietor of a saloon so used, and that, during a portion of the time alleged, while such proprietor was absent therefrom, and the defendant was behind the bar, drunken persons were seen to come out of the saloon, one such apparently being ejected. *Held*, that the jury might properly find that during such time the defendant was keeping and maintaining the premises.

A witness, who testified, on direct examination, that during a portion of the time he was at the saloon on a number of occasions, and saw sales of hop beer, but no intoxicating liquors nor any sale or delivery of any, on cross-examination answered in the affirmative a question as to whether or not he was drunk near the saloon during that time. *Held*, that it could not be said, as matter of law, that the question was irrelevant.

COMPLAINT for keeping and maintaining a common nuisance, to wit, a tenement at Brockton, used for the illegal keeping and illegal sale of intoxicating liquors, from May 1, 1887, to December 13, 1887.

At the trial in the Superior Court, on appeal, before *Pitman*, J., evidence was introduced tending to show that the tenement in question was a saloon, of which one Sumpter was the proprietor; that the defendant was employed by Sumpter as a bar-keeper; that on December 12, 1887, while Sumpter was present and the defendant was behind the bar at work, intoxicating liquors were duly seized in the saloon; that, during October, 1887, while Sumpter was absent from the saloon and the de-

fendant was present behind the bar, several persons were seen to come out of the saloon intoxicated, one such apparently being ejected. A witness, called by the defendant, testified that, after October 1, 1887, and during the time alleged, he was at the saloon a number of times and saw sales of hop beer there, but no intoxicating liquors, and no delivery or sale of any. On cross-examination he was asked, against the defendant's objection, whether or not he was drunk near the premises during the last fall, that of 1887, and he testified that he was so drunk.

The defendant asked the judge to rule that there was not sufficient evidence of a control by the defendant of the saloon at any time when it was used for the illegal purpose alleged. The judge refused so to rule, the defendant excepting thereto, and gave suitable instructions to the jury as to the control of the saloon and the liability of the defendant as an agent, not otherwise excepted to.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

A. J. Waterman, Attorney General, and *H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

C. ALLEN, J. 1. The defendant, being clerk for the proprietor, is charged with keeping and maintaining the saloon. If he only acted as the proprietor's servant, under his direct personal supervision, he could not properly be convicted of this offence. But he might properly be convicted thereof, if, in the proprietor's absence, he made illegal sales, or otherwise assumed a temporary control of the premises. *Commonwealth v. Churchill*, 136 Mass. 148. *Commonwealth v. Galligan*, 144 Mass. 171. *Commonwealth v. Murphy*, 145 Mass. 250. In applying this rule to the present case, the jury might properly find, from the evidence stated in the bill of exceptions, that the defendant was keeping and maintaining the premises in October.

2. A witness cannot be asked in cross-examination, in order to affect his credibility, about his part in transactions irrelevant to the issue on trial. *Commonwealth v. Schaffner*, 146 Mass. 512. But the question whether the witness was not drunk near the saloon the last fall corresponded in time, and bore some relation to the subject, of his testimony. Ordinarily, such a question

would not be proper, merely for the purpose of throwing discredit upon a witness. But, in view of the witness's testimony on his direct examination, we cannot say, as matter of law, that the question was irrelevant. It was within the discretion of the presiding judge. *Exceptions overruled.*

COMMONWEALTH vs. JOHN F. BROWN.

Nantucket. October 23, 1888. — November 26, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Offence against Town and County of Nantucket — Qualification of Inhabitants as Grand and Traverse Jurors — Warning of Town Meeting for Listing and Drawing Jurors — Forgery of "Discharge for Money."

The inhabitants of the town and county of Nantucket, which are territorially the same, are not disqualified by reason of interest to serve as grand jurors in presenting an indictment for an offence against the town or county, or as traverse jurors at the trial, or to act officially in listing and drawing such jurors.

A person was sworn as one of a grand jury, and acted with them in their deliberations and in the presentment of an indictment, his name having been placed in the jury box and drawn and returned by the selectmen in response to a venire, although previously the town had ordered it to be stricken from the jury list. *Held*, that, in the absence of evidence of his personal disqualification, the indictment was not invalidated by the irregularity by which he came to serve.

At the trial of an indictment for forging and uttering, with intent to defraud a town or county, certain writings, each of which was described as a "discharge for money," and purported to be a bill rendered to the town or county and duly receipted upon payment, it appeared that the bills so receipted were forged by the defendant, who was a town and county officer, and were presented by him to the disbursing officers of each as vouchers for the reimbursement of moneys assumed to have been expended by him, but without authority, on behalf of each; and that the amounts therein set forth were duly paid to him, no other writing or claim for such alleged reimbursement being presented by him. *Held*, that the indictment was sufficient, and that there was no variance.

INDICTMENT, returned at July term, 1888, of the Superior Court of the county of Nantucket, in twenty-two counts, for forging and uttering certain writings, each of which was described as a "discharge for money," and purported to be a bill

rendered to the town or county of Nantucket by various persons or firms for personal services, for rent of post-office box, and for articles furnished to each, and to have been duly receipted upon payment thereof.

Upon the day following the return of the indictment, the defendant filed this special plea to the presentment: "1. Because the said grand jury received and had with them, and there was sworn as one of said jury, one Andrew D. Winslow, who had not been legally put upon the list of jurors, or legally drawn for jury service; and said Winslow, although a stranger and not legally of the grand jury, was permitted to and did share in their deliberations and their action upon said indictment, and in the return of the same. 2. Because the list of jurors from which the said jurors were selected was not legally accepted by the inhabitants of the town of Nantucket at a legal meeting. 3. Because the names of said grand jurors were not drawn from the list of jurors in the manner provided by law. And this the said Brown is ready to verify."

To this plea the district attorney filed a replication, which traversed the allegations of the plea.

At the hearing upon the plea and replication, before *Dunbar, J.*, the following facts appeared. The alleged forgings and utterings were committed, if at all, by making or raising vouchers, which were presented to the town or county treasurer of Nantucket, and were claimed by the government to have been done with intent to defraud either the town or the county. The name of Winslow was upon the list of jurors prepared by the selectmen of the town of Nantucket, but at the town meeting to which the list was submitted for revision was ordered to be stricken from the list by vote of the town. His name was however placed or left in the jury box, and was drawn by the selectmen and returned to the court in response to a venire, and he was sworn as one of the grand jury, and took part in their deliberations and in the return of the indictment. The warrant for the town meeting at which the jury list was revised was dated May 26, 1888, and was addressed to either of the constables of the town, and directed the notification of a meeting to be held on June 2, 1888, and the service of the warrant by posting copies of the same in two public places within the town, which

were named, but fixed no time for such posting. The return of the constable upon the warrant was: "Pursuant to the within I have notified and warned the inhabitants of the town of Nantucket qualified to vote in town affairs to meet at the time and place and for the purposes, within mentioned, by posting up notices thereof in two public places in said town."

Subsequently, the drawing of the jurors was conducted by the selectmen at a town meeting called for the purpose, the warrant for that meeting and the return thereon being similar in form to the warrant and the return for the former meeting. There was no evidence of any by-law or vote of the town as to the service of warrants, or the warning or calling of meetings, or of any action of the town with reference to the drawing of jurors in town meetings.

Upon these facts the defendant asked the judge to rule as follows: "1. That the presence of Winslow with the grand jury, and his taking part in their deliberations and in the presentment of the indictment, vitiated the presentment, and that the defendant could not be called upon to plead thereto, or be held to trial thereon. 2. That the grand jury was illegally drawn and returned into court; that it was not a legal grand jury, and that its presentment was not a valid presentment against the defendant. 3. That, by reason of bias and interest, a grand jury drawn and made up from the inhabitants of the town and county of Nantucket was not competent to make a presentment for crimes against the county or the town treasury." The judge declined so to rule, but ruled that the presentment was valid, and overruled the plea; and the defendant excepted.

The defendant was then called to plead to the indictment; but before pleading generally thereto he filed a plea to the sufficiency of the traverse jury, which stated reasons similar to those set up in the second and third grounds of the plea to the presentment of the grand jury. At the hearing upon this plea, it appeared that the revision of the list of traverse jurors which had been prepared by the selectmen, and the drawing of such jurors in response to the venire, took place at the same meetings at which the revision of the list of grand jurors and the drawing of the same took place, and the defendant requested the judge to

make rulings with regard to the traverse jurors similar to those recited in the second and third rulings requested as to the grand jury. The judge refused so to rule, but ruled that the traverse jurors were competent to try the defendant on the indictment, and overruled the plea ; and the defendant excepted.

The defendant then pleaded not guilty, and, at the trial, evidence was introduced tending to show that the receipted bills described in the indictment were presented by the defendant, who was the town and county clerk and the clerk of courts for the county, to the town or county disbursing officers, and were received and acted upon by them, not as claims then due to the persons named as creditors in the bills, but as genuine vouchers for moneys assumed to have been expended by him in behalf of the town and county without any express authority therefor, simply as evidence to support claims by him for reimbursements, no other writings reciting claims for reimbursements being presented by him ; and that the defendant actually collected from such disbursing officers the amounts set forth in these vouchers, with intent to defraud.

At the conclusion of the evidence, the judge refused to rule, as requested by the defendant, among other things, as follows :
1. As between the defendant and the town or the county, no one of the alleged forged papers was a discharge for money within the statute as to forging and uttering. 5. If any person makes a purchase, or pays a bill, assuming to act for the county, but as a volunteer, and claims reimbursement therefor, a receipted bill of the purchase or payment made by him for which he claims reimbursement is not a discharge for money, and under the counts of this indictment charging the forgery or uttering of such vouchers there would be a variance, and the jury should acquit by reason of a variance. 9. Upon an indictment for forging or altering a discharge for money, the intent must be to defraud some person party to the instrument, and not a person to whom the instrument is intended to be exhibited collaterally, and merely as evidence or as a voucher for an independent claim. 11. Upon the evidence, there is a variance as to the description of the instrument in each count, and there must be an acquittal by reason of variance. 12. Upon the evidence, unless the jury find an intent to defraud some person other than the

town or county of Nantucket, they cannot convict upon any count.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. W. Chaplin, (*L. E. Griswold* with him,) for the defendant.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

KNOWLTON, J. The indictment in this case contains twenty-two counts, some charging the defendant with forging, and others with uttering, discharges for money, payable from the treasury of the town and county of Nantucket. The defendant pleaded in abatement to the indictment, and upon the facts which appeared at the hearing he asked the court to rule, that, "by reason of bias and interest, a grand jury drawn and made up from the inhabitants of the town and county of Nantucket was not competent to make a presentment for crimes against the county or the town treasury." The court refused so to rule, and ruled that the presentment was valid.

We may assume that the defendant is right in his contention that objections to an indictment on account of the disqualification of a grand juror may be taken when the defendant is first called upon to plead to the indictment; for, under our practice, it commonly happens that he has no opportunity to make his objection earlier. See *Commonwealth v. Parker*, 2 Pick. 550, 559; *State v. Symonds*, 36 Maine, 128; *United States v. Hammond*, 2 Woods, 197. At a later stage of the proceedings the defendant made a similar objection to the jury of trials, which was also overruled. These questions, founded on the alleged interest of the jurors as residents of the town and county of Nantucket, are substantially the same in relation to the grand jury and to the traverse jury.

The general rule, that judges and jurors should not be interested in a controversy which they are called upon to settle, is founded upon familiar principles of justice. But there are some kinds of interest which are too minute and too remote to be regarded. Every citizen of the Commonwealth is interested in the enforcement of the laws. But if that interest disqualified him from sitting as a juror, or otherwise participating in a trial, no criminal could be punished. From the necessity of the case,

we trust the integrity and sense of justice which most men possess so far as to believe that they will not be improperly influenced by an interest of this kind, which they have in common with the whole community.

In the case at bar, the inhabitants of Nantucket had no direct pecuniary interest in the proceedings. The town and county treasury could not be in any way affected by the result of the prosecution. The judgment which might be rendered could not be used as evidence in a subsequent civil suit. They had no interest different in kind from that of all the people of the Commonwealth. We by no means suggest that a victim of a crime should ordinarily be permitted to sit as a juror to try a person accused of committing it, for his feelings would be likely to be so aroused as to render him unfit for such a service. His relation to the matter under investigation would naturally lead him to form an opinion as to the guilt of the defendant, or would induce bias or prejudice; and if this appeared, he would at once be set aside as disqualified to serve as a juror. But the crimes charged in this indictment were not against any of the persons who were upon the jury. They were committed against the town or county of which the jurors were inhabitants; and the bias, prejudice, or other kindred feeling, which might be expected in an individual who had suffered grievous wrong, would not be likely to exist in reference to a crime against the public treasury.

Some of the inhabitants might be so far affected in their feelings as to be unfit for jurors. In respect to the traverse jurors, the defendant could have protected his rights in that particular by asking for an examination of them before they were impanelled. See *Commonwealth v. Moore*, 148 Mass. 136; *Boston v. Baldwin*, 139 Mass. 315. In regard to the grand jury, it is always possible that some of the jurors will be subject to bias, or will have formed an opinion, in some of the numerous cases which commonly come before them. That possibility is contemplated in the statute which prescribes the form of the oath to be administered to them. Pub. Sts. c. 218, § 5. But the function of that jury is merely to present an accusation for trial, and it may be presumed that one conscious of interest or bias in a particular case would refrain from acting in it. It should not

be held that mere inhabitancy unfits one for sitting as a juror in an ordinary prosecution of an offence against the town in which he lives.

A direct financial interest stands on somewhat different grounds. *Clark v. Lamb*, 2 Allen, 396. *Hawes v. Gustin*, 2 Allen, 402. *Hush v. Sherman*, 2 Allen, 596. But it has often been held that the Legislature may provide that such an interest, if very slight, shall not disqualify one from acting as a judge or juror. *Commonwealth v. Ryan*, 5 Mass. 90. *Hill v. Wells*, 6 Pick. 104. *Commonwealth v. Emery*, 11 Cush. 406. *Commonwealth v. Reed*, 1 Gray, 472. *State v. Batchelder*, 6 Vt. 479. *Diveny v. Elmira*, 51 N. Y. 506, 512. *State v. Williams*, 30 Maine, 484. See Pub. Sts. c. 160, § 13; c. 161, §§ 4, 5, 6, 9, 11; c. 170, § 38. And the legislative intention that a slight financial interest shall not disqualify a juror is readily inferred where otherwise there would be a failure of justice. *Commonwealth v. Ryan*, 5 Mass. 90. *Commonwealth v. Worcester*, 3 Pick. 462. *Commonwealth v. Burding*, 12 Cush. 506. *Hawes v. Gustin*, 2 Allen, 402. *Commonwealth v. McLane*, 4 Gray, 427. *State v. Intoxicating Liquors*, 54 Maine, 564.

In *Connecticut v. Bradish*, 14 Mass. 296, which was a civil suit brought by the State of Connecticut to foreclose a mortgage, it was held, under the law prohibiting interested persons from testifying, that an inhabitant of that State was not an incompetent witness. In *State v. Batchelder*, 6 Vt. 479, it was decided that a justice of the peace might try a criminal case in which the fine to be paid upon conviction went to the town where he lived; and in *Middletown v. Ames*, 7 Vt. 166, it was said that the rule applied equally to jurors, and it was held that a suit to recover for a breach of a recognizance might be tried before jurors from the town to which the fine would have gone had there been a conviction in the original case. In *State v. Wells*, 46 Iowa, 662, it was held to be no objection to a juror that the trial was for a violation of an ordinance of his own city.

Where a municipality has no direct pecuniary interest in a trial, but only such an interest as might result from the commission of an offence against its property, neither our Legislature nor the courts have been accustomed to treat its interest as affecting the qualifications of its inhabitants to sit as jurors. Statutes have been passed removing the disqualification of jurors

in certain criminal cases which may affect pecuniary interests. The Pub. Sts. c. 170, § 38, covers cases where the fine or forfeiture goes into the treasury of the county, city, or town, and it was probably thought that in others like the one at bar there was no such interest as made it necessary to include them. See *Phillips v. State*, 29 Ga. 105; *Doyal v. State*, 70 Ga. 134. Our statutes provide that, in certain cases, criminal trials may be had in counties other than that in which the offence was committed. Pub. Sts. c. 11, § 27; c. 150, §§ 24, 26; c. 202, §§ 9, 10, 31; c. 210, § 7; c. 213, §§ 19-24.

But this is not one of those cases, and the indictment in it could have been found, and the trial could have been had, in no other county than Nantucket. We are of opinion that our statutes must be held to be a legislative declaration that jurors residing in Nantucket, if otherwise unobjectionable, were competent to sit in the trial of it. The same considerations which induce us to hold that the inhabitants were not disqualified from sitting as jurors, apply with still greater force to the defendant's contention that the officers of the town and county were disqualified from acting in relation to the drawing and summoning of the jurors.

The defendant also asked the court to rule that the indictment was bad, and that the traverse jurors could not sit to try it, because the meetings of the inhabitants of the town at which the jury list was revised and at which the jurors were drawn were not legally warned. But it does not appear that they were not legally warned. There were proper warrants, seasonably issued, with a return of the officer upon each of them saying that he notified and warned the inhabitants pursuant to the warrant. The most that can be said in favor of the defendant's contention is, that it does not distinctly appear by the returns that the postings were as long as they should have been before the respective meetings. But we are of opinion that, in a case of this kind, it is not to be assumed upon the evidence that the proceedings were illegal in this particular. *Houghton v. Davenport*, 23 Pick. 235. *Briggs v. Murdock*, 13 Pick. 305. *Wallace v. Townsend Parish*, 109 Mass. 263. *Ford v. Clough*, 8 Greenl. 334.

The view which we have taken of the preceding questions makes it unnecessary to consider whether the defendant's objec-

tion to the traverse jury, taken by plea, was correct or sufficient in form.

Another objection to the indictment, raised by the plea first referred to, was that Andrew D. Winslow was not legally drawn as a grand juror, because his name was, by vote of the town, ordered to be stricken from the list of jurors prepared by the selectmen, and submitted to the town for revision. The fact here relied on was proved at the hearing before the judge; and it further appeared that, notwithstanding this, his name was placed or left in the box, and was drawn by the selectmen in response to the venire of the court, and was returned to the court, and he was sworn as one of the grand jury, and acted with them in their deliberations and in the return of the indictment. It has often been held in other jurisdictions, that an indictment found by a grand jury upon which a disqualified person is sitting is void; for it is not certain in such a case that the indictment was found by twelve qualified jurors. The disqualified person may have been one of only twelve who voted for the indictment. 2 Hawk. P. C. c. 25, § 28. *United States v. Hammond*, 2 Woods, 197. *State v. Symonds*, 36 Maine, 128. *Doyle v. State*, 17 Ohio, 222. *State v. Cole*, 17 Wis. 674. *Barney v. State*, 12 Sm. & Marsh. 68.

How such an indictment should be regarded is a question which we need not decide; for a distinction must be noted between a juror who is personally disqualified, and one who possesses all the requisite qualifications, but is irregularly and improperly drawn. The general rule is, that mere irregularity in the proceedings by which a juror gets upon the panel does not affect the validity of his action. *Commonwealth v. Parker*, 2 Pick. 550, 559. *Page v. Danvers*, 7 Met. 326. *United States v. Reeves*, 3 Woods, 199. *United States v. Ambrose*, 3 Fed. Rep. 283. *Hill v. Yates*, 12 East, 229, 230. *The King v. Hunt*, 4 B. & Ald. 430. *Hardin v. State*, 22 Ind. 347. Nearly all the cases in which verdicts or indictments have been set aside rest upon an absolute disqualification of a juror. Such were *United States v. Hammond*, 2 Woods, 197; *Doyle v. State*, 17 Ohio, 222; *State v. Cole*, 17 Wis. 674; *Barney v. State*, 12 Sm. & Marsh. 68; and *State v. Duncan*, 7 Yerg. 271. The case of *State v. Jacobs*, 6 Texas, 99, cited by the defendant, has been reviewed and

explained in *Vanhook v. State*, 12 Texas, 252, which sustains the contention of the Commonwealth. *Dutell v. State*, 4 G. Greene, 125, depends upon a local statute.

Another distinction which should be observed is that between the case of a juror chosen by a method wholly illegal and unwarranted, and one where the regular course of procedure is pursued in general, but is not strictly and properly followed. *State v. Symonds*, 36 Maine, 128, was a case of the former kind, in which the selection of talesmen for a grand jury was held to be without jurisdiction and wholly illegal, and the jurors were decided to be incompetent to serve. The difference between such a proceeding and a failure to regard some of the requirements of the law, where there is an honest effort to act under it, is referred to in *United States v. Ambrose*, 3 Fed. Rep. 283, a case which was very similar to the one at bar. Inasmuch as there was nothing to show that Winslow was disqualified to serve as a juror, or that his being drawn was anything else than an irregularity, we are of opinion that the ruling of the court upon this point was correct.

The only remaining exceptions relied upon are to the refusal of the judge to grant the first, fifth, ninth, eleventh, and twelfth requests for instructions to the jury. The several papers referred to in the indictment were sufficiently described as discharges for money. There was no variance. Upon an indictment for forging or uttering these papers, the circumstances in relation to the payment referred to in the requests were immaterial. The intent to defraud referred to in the statute may relate to a party who is not named in the instrument. Pub. Sts. c. 214, § 26; Pub. Sts. c. 204, § 1. *Commonwealth v. Costello*, 120 Mass. 358.

Exceptions overruled.

COMMONWEALTH vs. HENRY KERN.

Bristol. October 23, 1888. — November 26, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Keeping of Intoxicating Liquors for Unlawful Sale — Locality of Offence — License.

The offence of keeping intoxicating liquors with intent to sell the same unlawfully is not made local by the fact that licenses to sell such liquors may be issued in one town and not in another; and it is sufficient if the proof shows that the offence was committed within the county.

INDICTMENT for keeping intoxicating liquors for sale at Attleborough, on September 30 and October 8, 1887, with intent unlawfully to sell the same in this Commonwealth.

At the trial in the Superior Court, before *Staples, J.*, the evidence tended to show that the offence was committed as alleged in a certain tenement situated in the new town of North Attleborough, and more than one hundred rods from the boundary line; and it was admitted that North Attleborough had become, under the St. of 1887, c. 412, a legally incorporated town on July 30, 1887.

Upon this evidence the defendant requested the judge to rule, and instruct the jury, that the offence set out in the indictment was of a local nature, and that there was a fatal variance between the proofs and the allegations in the indictment, and that the jury should acquit the defendant; but the judge ruled that the offence was not local in its nature, and, though it was proved that the defendant committed the offence in North Attleborough, it would not be a variance.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Brown, for the defendant.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

MORTON, C. J. When an offence is local in its nature, the allegation of place is a necessary part of the description of the offence, and it must be proved as laid. Thus it has been held

that the offence of maintaining a tenement used for the illegal sale or keeping of intoxicating liquors is a local offence, like the offence of larceny in a building, or burglary, or arson, and the allegation of place is material. The locality of the tenement or building fixes the identity of the offence charged. *Commonwealth v. Heffron*, 102 Mass. 148. *Commonwealth v. Bacon*, 108 Mass. 26. But where an offence has no essential connection with the place in which it is committed, like the offence of simple larceny or assault, the place is not material, and need not be proved as alleged; it is sufficient to show that the offence was committed at any place in the county. *Commonwealth v. Tolliver*, 8 Gray, 386. *Commonwealth v. Creed*, 8 Gray, 387. *Commonwealth v. Lavery*, 101 Mass. 207.

The offence of keeping intoxicating liquors with intent to sell the same unlawfully is different in its character from the offence of maintaining a tenement used for the illegal keeping or sale of intoxicating liquors. This offence does not involve any fixed or certain place as a part of its identity. Liquors may be kept for illegal sale in a movable vehicle or upon the person. It is not local in its nature, and the allegation of place is not material. It is sufficient if the proof shows that the illegal keeping was within the county.

The defendant contends, that, as under our laws a man may be licensed to sell intoxicating liquors in one town while he cannot in another, the allegation of place has become material. The fact that a man has a license is a matter which affects the defence or evidence, but does not change the essential character of the offence, or the mode of stating it in the indictment. Though the evidence may be different in different places, the offence is the same in all, that of keeping intoxicating liquors with intent to sell the same unlawfully; and whether there is a license or not, the allegation of place does not become a matter of local description of the offence.

Exceptions overruled.

COMMONWEALTH vs. ELIAS B. CHASE & another.

Bristol. October 23, 1888. — November 26, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Evidence of Accomplice — Corroboration.

At the trial of an indictment against two brothers for the burning of a barn, a boy, admitted to be an accomplice, testified that they set fire to the barn; that on a day prior thereto one of them expressed a wish that it might be a light night so that the barn might be set afire, and that on the day of the burning, during which he was at their house, they taunted the owner of the barn with regard to evidence previously given by him on a complaint against them. There was evidence from others, that the defendants had on other occasions taunted the owner of the barn because of such evidence, and threatened him with various harm; and that one of them, in the other's absence, had threatened to burn the barn. The defendants, who denied at the time of their arrest that the boy was at their house on the day of the burning, testified that he was at their house on that day. *Held*, that there was evidence tending to corroborate the boy's testimony.

INDICTMENT, against Elias B. Chase as principal and John F. Chase as accessory, for burning the barn of Gideon Horton.

At the trial in the Superior Court, before *Blodgett, J.*, John F. Coates, who was fifteen years old, and was admitted to be an accomplice, testified that the defendants were brothers and lived together; that the barn was burnt about seven o'clock P. M. on Sunday, November 20, 1887; that he spent the previous Sunday at their house, at which time John said that he wished it would be a good light night, so as to set Horton's barn afire; that he spent Sunday, November 20, with them and at their house; that during the day the defendants taunted Horton with regard to evidence given by him in a complaint against them for keeping an unlicensed dog; that shortly after seven o'clock in the evening of that day John said that he thought it was a good night to set Horton's barn afire; that he then poured a quantity of kerosene oil into a bottle and handed it to Elias, telling him to take it and scatter it over the hay in the barn; that Elias took the bottle of oil and left the house, and about five minutes later John told the witness to go down to the barn; that he went to the barn as directed by John, whereupon Elias placed

him on guard but a short distance from the barn ; and that Elias then set the barn on fire.

There was also evidence from other witnesses tending to show that, prior to Sunday, November 13, the defendants had threatened various harm to Horton, because he had testified against them on a complaint for keeping an unlicensed dog, and had also taunted him with respect to the evidence which he then gave ; that John had told one O'Donnell, in August, 1887, when Elias was not present, that, if he "could not get away with Gid Horton, he would burn his barn up"; and that the defendants, just after their arrest upon the charge of burning the barn, denied that the boy Coates had been at their house on the day of the burning. The defendants testified that Coates was at their house on Sunday, November 20, 1887.

The judge, as requested by the defendants, instructed the jury that it was not safe to convict the defendants on the uncorroborated testimony of an accomplice, and that, unless he was corroborated in some material fact, he should advise them to acquit ; but refused to rule, as further requested by the defendants, that, as matter of law, there was no evidence that tended to corroborate the accomplice as to any material fact, and instructed the jury, that, "if they found that the defendants made the threats testified to as before stated, the making of such threats tended to corroborate the testimony of Coates ; that if they believed the evidence of the officers, that the defendants, at the time of their arrest, denied that the Coates boy was with them on Sunday, the day of the fire, that would be a legal corroboration of the accomplice ; that it would not be competent for them to convict John and acquit Elias ; and advised them to acquit both defendants if there was corroboration of the testimony of the accomplice as to John only."

The jury rendered a verdict of guilty ; and the defendants alleged exceptions.

J. Brown & A. H. Hood, for the defendants.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

DEVENS, J. The defendants were indicted for burning the barn of one Gideon Horton, Elias B. Chase as principal, and John F. Chase as accessory. At the trial, the prosecution relied

mainly upon the testimony of a boy named Coates, who appeared by his own testimony, and was conceded to have been, an accomplice. The defendants requested the court to advise the jury that it was not safe to convict the defendants on the uncorroborated testimony of an accomplice, and that, unless he was corroborated in some material fact, the court should advise the jury to acquit. This request was complied with; but the court declined to rule, in answer to the defendant's further request, that there was no evidence in the case that tended to corroborate the accomplice as to any such fact; and instructed the jury, that, if they found that the defendants had made certain threats testified to, the making of such threats tended to corroborate the testimony of Coates.

While these threats to injure Horton, and to revenge themselves for an injury, real or fancied, which he had done them, connected with evidence of taunts showing malice and ill-will, are very numerous, and are in various forms of expression, they are not the same, as regards time and place, as those facts testified to by the accomplice. The defendants therefore urge that they can have no legitimate tendency to corroborate his story. But evidence which tends to prove the guilt of a defendant is sufficient by way of corroboration, although it does not directly confirm any particular fact stated by the accomplice.

"We think the rule is," says Mr. Justice Morton in *Commonwealth v. Bosworth*, 22 Pick. 397, "that the corroborative evidence must relate to some portion of the testimony which is material to the issue." The accuracy of this statement has never been questioned, and, "Taking the whole paragraph together," says Chief Justice Gray in *Commonwealth v. Holmes*, 127 Mass. 424, "it is manifest that the phrase 'material to the issue' is used as equivalent to 'involving the guilt of the party on trial,' or 'having necessary connection with the guilt of the defendant.'"

That threats made by the defendants to inflict serious injury on the party whose barn was burned were admissible as independent evidence, having a tendency to show that they were the guilty parties, cannot be controverted. *Commonwealth v. Goodwin*, 14 Gray, 55. Proof of a motive and intent to commit a crime, which there was evidence to show had been committed

by the defendants, was material to the issue, and would legitimately tend to strengthen a belief in the statement of the accomplice that they had committed it. Only one of the defendants appears to have been present when the direct threat of burning the barn was made; but the defendants requested no ruling as to the evidence of threats, as it bore upon them individually. If it had been made, it would only have shown that the corroboration of the accomplice was stronger as to the one making this threat than as to the other, whose threats as testified to were less definite, but which still, whether made by himself or by his co-defendant and assented to by himself, were enough to show an intent and a disposition to injure Horton.

The court further instructed the jury, that, if they believed the evidence that the defendants at the time of their arrest denied that the Coates boy was with them on Sunday, the day of the fire, this would be a legal corroboration of the accomplice. This ruling was made in connection with the fact, that, at the trial, the defendants had both testified that the Coates boy was with them on Sunday. The circumstance that the accomplice was with the defendants on that day is of the utmost importance. If he was not, his story was necessarily false. Their original denial showed that they were seeking to maintain by falsehood a defence to the charge made against them, bore directly on the question of their guilt, and tended to prove it. Whether the mere fact that the boy was with them on that day, if that were all, would corroborate his testimony, we need not consider. Their denial that he was there, and the subsequent proof of its falsity, were facts of importance.

Exceptions overruled.

COMMONWEALTH vs. CHARLES N. PLUMMER.

Essex. November 7, 1888. — November 26, 1888.

Present: MORTON, C. J., FIELD, DEVENS, C. ALLEN, & KNOWLTON, JJ.

Criminal as a Witness — Immunity from Prosecution — Absence of Promise.

On a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, the defendant pleaded in bar that he was employed as a bar-keeper to sell such liquors by a city hotel-keeper, against whom a complaint was made for maintaining a common nuisance under the Pub. Sts. c. 101, §§ 5, 6; that the city marshal prosecuting the latter complaint needed him as a witness, and, knowing that he was willing to testify against his employer, but without having any conversation with him, summoned him as a witness; and that because of his appearance in court to testify the hotel-keeper pleaded guilty. *Held*, that there was no evidence of any promise, express or implied, that the defendant should be protected from prosecution.

COMPLAINT to the Police Court of Haverhill for keeping intoxicating liquors, on November 11, 1887, with intent unlawfully to sell the same in this Commonwealth.

In the Superior Court, on appeal, the defendant filed a plea in bar alleging these facts. The defendant was employed, from August 27, 1887, to November 12, 1887, by one Wentworth, as a bar-keeper, to sell intoxicating liquors at the Eagle House in Haverhill, where, on November 11, 1887, intoxicating liquors were duly seized. Subsequently, a complaint was made against him for the illegal keeping of such liquors. On November 14, 1887, a complaint was made against Wentworth for keeping and maintaining a common nuisance, to wit, a tenement used for the illegal sale and illegal keeping of intoxicating liquors from August 20, 1887, to November 12, 1887, at such Eagle House. The city marshal of Haverhill, who prosecuted the latter complaint, understood that the defendant was ready and willing to testify against Wentworth, and needed and intended to use him as a witness; and, without having any conversation with the defendant, duly summoned him as a witness to testify against Wentworth. The defendant attended the police court as a witness, and was ready and willing to testify against Wentworth, all of which Wentworth knew, and in consequence thereof pleaded guilty to the complaint.

At the hearing, before *Bacon, J.*, on the plea and a demurrer thereto, it appeared that there was no express agreement made with the defendant, or with any representative of his, by the government to protect him from prosecution. The judge overruled the plea.

The defendant was then tried, and the jury returned a verdict of guilty; and the defendant alleged exceptions.

B. F. Brickett & C. H. Poor, for the defendant.

A. J. Waterman, Attorney General, & *H. C. Bliss*, Assistant Attorney General, for the Commonwealth.

MORTON, G. J. We need not discuss the question whether the Commonwealth would be barred from prosecuting a person for an offence by the fact that the attorney general, district attorney, or other prosecuting officer had promised such person immunity, upon calling him as a witness in the prosecution of another person for the same offence, or one connected with it. Such question is not raised in the case at bar, because there is nothing to show that the city marshal made any promise to the defendant, express or implied, that he should be protected from prosecution. *Commonwealth v. Brown*, 103 Mass. 422. *Commonwealth v. Denehy*, 103 Mass. 424, note.

Exceptions overruled.

WILLIAM WEBSTER, executor, vs. JOSIAH A. ELLSWORTH.

Suffolk. November 23, 1888. — November 26, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Devise of Remainder — Curtesy.

A testatrix, by her will, gave the residue of her estate, subject to a life estate in her husband, to various persons, and provided that the share of any legatee who should die before the testatrix's husband leaving no issue should be distributed among the other legatees. A legatee and her husband had a child born alive, which died, and subsequently the legatee herself died before the husband of the testatrix. *Held*, that the surviving husband of such legatee had no estate by the curtesy, and took nothing as her representative.

APPEAL, by Josiah A. Ellsworth, from a decree of the Probate Court allowing the account of the executor of the will of

Anna Rowe. The will contained the following provisions which alone are material :

" 3. I constitute and appoint William Webster, attorney at law, now of 28 State Street, Boston, as executor and trustee under this will. . . . 4. I give, bequeath, and devise all the remainder of my property, real, personal, or mixed, of which I shall die seised and possessed, or to which I shall be entitled, to my said trustee, to hold the same in trust for my said husband during his natural life. 5. I give and bequeath out of the remainder of my property remaining at my husband's death [Here followed two small bequests]. 7. I give, bequeath, and devise all the remainder of my property, after payment of the above bequests, . . . one sixteenth to Mrs. Elsworth, wife of Josiah Elsworth. . . . If at the time of my said husband's decease, or at my decease, if he shall not survive me, any of the legatees named in this seventh clause shall have deceased, leaving issue surviving at that time, such issue shall have the parent's share by representation. The shares of such as shall at that time have deceased, leaving no issue, shall be distributed among the other legatees above named, and the issue then living of any deceased legatee by right of representation according to their several proportions above set forth."

At the hearing, before *W. Allen, J.*, it appeared that the testatrix died on June 4, 1886 ; that Jane M. Ellsworth, the wife of Josiah A. Ellsworth, who was the person called "Mrs. Elsworth, wife of Josiah Elsworth," in the seventh clause of the will, died on June 9, 1886, leaving no issue surviving ; that Philip C. Rowe, husband of the testatrix, died on July 13, 1886 ; that Josiah A. Ellsworth and Jane M. Ellsworth, who were married in 1863, had but one child, which died before the testatrix ; and that Josiah A. Ellsworth was appointed administrator of his wife's estate.

The appellant contended, among other things, that he was entitled to curtesy in one sixteenth of the real estate of the testatrix, as well as to a portion of the balance of the account, either in his own right or as such administrator.

The judge disallowed the appellant's claim, and ordered the decree of the Probate Court to be affirmed, and the case to be remanded ; and the appellant alleged exceptions.

C. Lamson, for the appellant.

W. Webster, pro se, was stopped by the court.

HOLMES, J. The limitation of one sixteenth of the residue to Mrs. Ellsworth, after payment of certain legacies, was a remainder, subject to the life estate of the testatrix's husband, Philip C. Rowe, who did not die until after Mrs. Ellsworth. For this reason, without going further, Mrs. Ellsworth's husband took no estate by the curtesy. *Shores v. Carley*, 8 Allen, 425, 426. Even if he had a right which would have passed to assignees in insolvency, (*Gardner v. Hooper*, 3 Gray, 398, 405.) it could not be greater than the right of his wife to which it was incident, and therefore was subject to the contingency of her remainder vesting in possession, which it never did. Assuming, in favor of the appellant, without deciding, that the remainder to Mrs. Ellsworth was a vested remainder in fee, still it was subject to be divested, and was divested by her death before Philip C. Rowe, the life tenant, leaving no issue living at that time. Therefore Mrs. Ellsworth's husband took nothing as her representative. *Blanchard v. Blanchard*, 1 Allen, 223, 230. *Dodd v. Winship*, 144 Mass. 461. Gray, Perpetuities, § 108. The principle of *Kelley v. Meins*, 135 Mass. 231, and of *Welsh v. Woodbury*, 144 Mass. 542, 545, has no application to a divesting clause of the kind before us, which is as familiar as any provision used by conveyancers. *Exceptions overruled.*

FRANKLIN WOOD vs. AUGUSTUS W. LOCKE.

Berkshire. September 11, 1888. — November 27, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Personal Injuries — Master and Servant — Risk incident to Employment of Railroad Brakeman.

A railroad brakeman, a part of whose duty it was to couple cars upon tracks known by him to be unblocked and dangerous, which the railroad company employing him had the right to use under a contract with the manager of another railroad which owned them, while so engaged caught his foot in a frog and was injured. *Held*, that he took upon himself the risk involved in the non-blocking of the frogs as against such manager, and could not maintain an action against him for the injuries.

TORT, against the manager of the Troy and Greenfield Railroad and the Hoosac Tunnel, for personal injuries occasioned to the plaintiff, a railroad brakeman, by catching his foot in an unblocked frog.

At the trial in the Superior Court, before *Staples, J.*, it was agreed that the defendant was such manager at the time of the accident and the bringing of the action, and that the Troy and Boston Railroad had the right, under a contract between it and such manager, or his predecessor in office, to use the yard and tracks of the Troy and Greenfield Railroad at North Adams. There was evidence that the plaintiff was in the employment of the Troy and Boston Railroad Company as a brakeman, and not in that of the defendant; that part of his duty for over a year before the accident had been to couple cars in the making up of trains in such yard at North Adams; and that while so engaged, on March 10, 1886, he caught his foot in a frog, which was not blocked, and was injured. The plaintiff testified, on cross-examination, that, so far as he knew, no frogs in the yard were blocked before the accident; that, if they had been blocked, they would have been in plain sight; that he knew that unblocked frogs were dangerous; and that he had known of accidents caused by such frogs.

Upon these facts, the judge ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

A. W. Preston & M. E. Couch, for the plaintiff.

G. A. Torrey, for the defendant.

W. ALLEN, J. The plaintiff knew the condition of the tracks and the danger attending their use, and voluntarily assumed the known risks of his employment upon them. *Pingree v. Leyland*, 135 Mass. 398. *Moulton v. Gage*, 138 Mass. 390. *Leary v. Boston & Albany Railroad*, 139 Mass. 580. *Taylor v. Carew Manuf. Co.* 140 Mass. 150. *Lake Shore & Michigan Southern Railway v. McCormick*, 74 Ind. 440.

It does not make in the plaintiff's favor that he was not in the employment of the defendant, but in that of the Troy and Boston Railroad Company, a corporation that was authorized to use the tracks. Whatever the obligations of the defendant may have been under the contract with that company, he was under

no greater obligation to its servants to furnish a suitable road for them to work upon, than he was under to his own servants. The plaintiff, in going to work upon the tracks at the invitation of the defendant contained in the contract with the Troy and Boston Railroad Company, assumed, as against the defendant, the obvious and known risks of the employment arising from the defective construction or condition of the road, as fully as if he had gone upon the tracks under a contract with the defendant as his servant. A majority of the court are of opinion, for these reasons, that the entry must be,

Exceptions overruled.

EDWIN F. KNOWLTON *vs.* NEW YORK AND NEW ENGLAND
RAILROAD COMPANY.

Worcester. October 1, 1888. — November 27, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Fire communicated from Locomotive Engine — Cause of Action — Damages —
Former Judgment — Arbitrators.*

A judgment against a railroad company for damages, sought to be recovered in one count, to two detached lots of woodland by a fire, set by a locomotive engine on one lot and thence spreading across an intervening lot to the other, is a bar to a subsequent action for damages to the latter lot by the same fire, on the ground that arbitrators, upon whose award the former judgment was entered, did not include therein the damage to such lot.

TORT, on the Pub. Sts. c. 112, § 214, for damage to the woodland of the plaintiff's intestate by fire communicated by a locomotive engine of the defendant.

Trial in the Superior Court, before *Aldrich, J.*, who, after a verdict for the defendant, allowed a bill of exceptions, the material part of which appears in the opinion.

T. G. Kent, (*G. T. Dewey* with him,) for the plaintiff.

F. P. Goulding, for the defendant.

C. ALLEN, J. At first sight of the bill of exceptions, the facts in this case appear to be rather involved, but those which

we have found to be material to the decision are simple. The original plaintiff, William Knowlton, was the owner of two lots of woodland, lying separate from each other, one of which was called the Taft and Chase lot, and the other the Southwick lot. On the 5th of May, 1881, a fire communicated from a locomotive engine of the defendant caught upon the Taft and Chase lot adjoining the railroad, and spread over the intervening space about half a mile to the Southwick lot, doing damage to both lots. For this damage, and also for another cause of action, now immaterial, Knowlton brought an action against the defendant on the 24th of October, 1882. The first count, after describing first the Southwick lot, and then the Taft and Chase lot, set forth that "the defendant's locomotive engine, in the defendant's use and operation, communicated fire to the plaintiff's said land, and burned over and destroyed the timber, wood, and other growth thereon, being to the extent of about thirty acres of the second described lot of land, and to the extent of about forty acres of the first described lot." The whole claim for damages to both lots was thus set forth in one count. There was evidence tending to show that there was also another fire which burned over the Southwick lot on September 2, 1883, and Knowlton brought a second action (which is the case now before us) in November, 1883, claiming damages for burning the Southwick lot, without alleging when the fire occurred. The first action was referred to arbitrators, who made an award in favor of the plaintiff, upon which judgment was afterwards entered, and the judgment was paid by the defendant.

At the trial of the present action, the plaintiff did not seek to recover damages arising from the fire of September 2, 1883, but sought only to recover for the damage done to the Southwick lot by the fire of May 5, 1881, and offered to show, by the testimony of the arbitrators, that in making their award they did not include any damages to that lot; and the plaintiff contended that therefore the judgment rendered in the first action did not include such damages. Assuming this to be true, without considering at all as to the competency of the evidence offered, and assuming also that the present action may fairly be deemed to have been commenced to recover damages to the Southwick lot from the first fire, (a point which is certainly doubtful,) it is

nevertheless plain that the action cannot be maintained; for the case falls fully within the principle of the decision in *Trask v. Hartford & New Haven Railroad*, 2 Allen, 331.

In that case, the plaintiff brought an action, and recovered judgment therein, against a railroad company for the loss of a shop by fire communicated by one of its locomotive engines. He afterwards brought another action, for the benefit of an insurance company, to recover for the loss of a dwelling-house and shed which took fire from the burning of the shop; but it was held that the first judgment was a bar. Mr. Justice Merrick, in delivering the opinion of the court, said: "The loss of the shop and of the dwelling-house and shed were distinct items or grounds of damage, but they were both the result of a single and indivisible act. The plaintiff therefore does not show any right to maintain another action to recover additional damages merely by showing that, in consequence of his omission to produce upon the trial all the evidence which was admissible in his behalf, he failed to obtain the full amount of compensation to which in that event he might have been entitled. . . . It would be unjust, as well as in violation of the fixed rule of law, to allow him to subject the defendants to the hazard and expenses of another suit to obtain an advantage which he lost either by his own carelessness and neglect, or by an intentional withholding of a part of his proof." The doctrine of this decision was reaffirmed in *Goodrich v. Yale*, 8 Allen, 454, 456, 458. See also *Folsom v. Clemence*, 119 Mass. 473.

The plaintiff seeks to distinguish the present case from that, on the ground that the damage to the Southwick lot constituted a separate cause of action. But the two cases are indistinguishable. It was held in *Perley v. Eastern Railroad*, 98 Mass. 414, that the burning of a piece of woodland, situated half a mile from the railroad track, by a fire which spread over intermediate land from grass near the track which was set on fire by a cinder from a locomotive engine, was a loss for which the railroad company was responsible, and that the fire was none the less communicated from the engine because the intermediate land belonged to other persons, nor because the distance was half a mile. The statute upon which the present action is founded is similar to the statute upon which that case rested.

Pub. Sts. c. 112, § 214. St. 1874, c. 372, § 106. Gen. Sts. c. 63, § 101.

The defendant's act causing the fire was single. The burning over of the Southwick lot by the spreading of the fire gave no new cause of action, but only additional damages resulting from the original cause of action. Otherwise, the plaintiff would have as many causes of action as the number of separate lots which he owned, and which were burned over by the same fire. Moreover, the plaintiff's counsel in the first action properly treated the cause of action as single, by putting the claim for damages to both lots into one count. No objection appears to have been raised to the declaration on the ground that two causes of action were included in one count; nor could such objection have prevailed. There was no new act of the defendant after the fire began on the first lot. The case is not like those of continuing injuries, as by a nuisance, where every continuance may be deemed a new injury. *Warner v. Bacon*, 8 Gray, 397, 406, 407.

Exceptions overruled.

JAMES D. TYLER & another vs. INHABITANTS OF HUDSON.

Worcester. October 3, 1888. — November 27, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Water Supply—Taking of Land on Great Pond—Land Damages—
Evidence—Reservation of Access.*

A town authorized by a special statute to take land on a great pond, and any water rights connected therewith, to create a storage reservoir, took a strip of land thereon, subject to certain rights of flowing which were also taken, as well as another strip outside of and adjoining the first, the fee of both strips being in the same littoral owner and parcel of a larger tract of his adjoining; and reserved to such littoral owner a right of access to the pond across the land taken. *Held*, at the trial of a petition to assess his damages for such taking, that evidence was admissible of the damage to the inner strip by the taking of the outer. *Held, also*, that the town could take a less estate than the fee, that the right reserved was appurtenant to all such owner's remaining land, and that the question whether it diminished the damage to such land should be submitted to the jury.

PETITION for the assessment of damages for land taken by the town of Hudson, under the St. of 1883, c. 149, on Gates Pond, a great pond in Berlin.

Trial in the Superior Court, before *Barker, J.*, who, after a verdict for the petitioners, allowed a bill of exceptions, which, so far as material, appear in the opinion.

J. T. Joslin, for the defendant.

F. P. Goulding, for the petitioners.

W. ALLEN, J. In the year 1867, one Sawyer, the owner of a tract of land containing about eighty acres, bounding on a great pond, called Gates Pond, granted to Francis Brigham, his heirs and assigns, "the right and privilege forever to flow and cover with water four acres and forty-eight rods of my land bordering on Gates Pond," reference being made to a plan for a more particular description of the land, "and the said Brigham has the right to raise the water in said pond to a bolt in a rock, situated on the northerly margin of that part of said land which has formerly been used as a meadow." Brigham, who acquired rights to flow land all around the pond, and his devisees until the taking by the respondent town, maintained a dam and raised the waters of the pond; but whether so as to flow the whole of the four acres and forty-eight rods, or whether as high as the bolt in the rock, does not appear, nor does it appear whether water as high as the bolt would flow the whole of the land. The petitioners acquired the title of said Sawyer to the whole tract, subject to the right of flowing granted to Brigham.

The St. of 1883, c. 149, authorized the town of Hudson to "take, by purchase or otherwise, and hold the waters of Gates Pond, . . . and the waters which flow into and from the same, together with any water rights connected therewith, and also all lands, rights of way and easements, necessary for holding and preserving such water, and for conveying the same to any part of said town of Hudson," with authority to erect dams, etc. Under this authority, the town of Hudson took the waters of Gates Pond, and the waters which flow into and from the same, with any water rights connected therewith, "and also any and all lands, rights of flowage," etc. and also the rights and privileges which had been granted to Francis Brigham by sundry deeds named, among them the aforesaid deed of Sawyer; "also

the lands adjacent to said Gates Pond, and adjoining the same, (other than the premises described in the foregoing deeds,) owned by the parties hereinafter named, and of the area hereinafter specified as follows: . . . of land of J. D. and M. R. Tyler, two acres and ninety-seven and one half rods," which land adjoined the four acres and forty-eight rods above referred to, and lay between it and their remaining land. Land is thus taken of eight owners, and a plan is referred to. On the petition of James D. and M. R. Tyler, the damages occasioned by the taking of their land were assessed by the county commissioners, and subsequently this petition was filed in the Superior Court to have the damages assessed by a jury.

The first question is, whether the court erred in admitting evidence of damage to the four acres and forty-eight rods of land, which was subject to the easement granted to Brigham by the taking by the town. The petitioners owned the fee of the land, and had the right to any use of it not inconsistent with the easement as it was exercised. It was part of the whole tract owned by them, and it did not appear that they had not some beneficial use of it in connection with the residue of the land, and the court could not say, as matter of law, that cutting it off from the residue did not impair the value of the right which the petitioners had in it. The objection that the town took only the right which Brigham had in the land is inapplicable. That right was taken from Brigham's devisees, and not from the Tylers. The damage we have referred to is not the taking of that land, but that resulting from injury to it from the taking of their adjoining land. What the damage was does not appear; the objection was that any evidence to show damage was incompetent.

The other question arises from the reservation made by the town when the land was taken. We think the court erred in ruling that it was competent for the petitioners to introduce evidence to prove their damage, the same as if no reservation had been made, or attempted to be made, in reference to that portion of the petitioners' land not taken. So far as material to this discussion, the reservation is in these words: "In this taking, the reservation is expressly made to the eight landholders above named, their heirs and assigns, for their cattle

to come to said Gates Pond to drink, and to said owners, their heirs and assigns, to come to said pond to cut ice for domestic purposes, and to otherwise enjoy the use of said pond."

The circumstances under which this reservation was made can be briefly stated. In 1867 the pond was a great pond in its natural condition. Brigham, then having procured from all the littoral owners a right to flow their lands, built a dam, and raised the water of the pond above its natural level. This continued without any interference by the Commonwealth until the taking by the town in 1884. At that time, the town took land of all the littoral owners for the purpose of raising the water still higher, and of protecting the shores of the pond, and reserved to each a right of access to the pond over the land taken. We think that this was intended, and must be held, to be appurtenant to the remaining land. The part of the land of each owner which adjoined the pond was taken, and the right was reserved to "the eight landholders," and "to the said owners, their heirs and assigns," of access over the land taken to the pond. The access could be only from the part of the respective lands which was not taken, and the intention is manifest to reserve the right to the owners and landholders, not as persons or as owners of the land taken, but as owners of lands part of which was taken; and the right ought to be held as appurtenant to the whole land.

The right to take the land by purchase or otherwise does not involve the obligation to take the whole interest in land purchased or otherwise taken. That a right of way could be reserved in land taken by purchase will not be questioned; the objection to reserving a right in the owner in land taken *in invitum* is technical rather than substantial. It is true that, in a sense, it may be said to create a new estate in him without his assent. A technical answer might be, that, the estate being for his benefit, his consent and acceptance simultaneous with the taking will be presumed. The real answer is that the refinements and nomenclature of conveyancing will not be applied to a taking by right of eminent domain. No more land and no greater interest in it need be taken than the public use requires. If the right to make a particular use of the land is of benefit to the owner, and puts no new burden upon him, and does not

interfere with the public use for which the land is taken, there is no reason that he should be deprived of that use, and be paid its value as damages; all the right to use the land except that right may be taken, and that be left in him to enjoy or not as he pleases. If the right is of value, a valuable right in the land will remain in him, though he may refuse to exercise it.

We are of opinion that the whole estate in the land was not taken, but that a right in it appurtenant to the whole land of which it was parcel was left in the owners. Whether that right diminished the damage to the adjoining land should have been left to the jury. The raising of the water of the pond by Brigham did not destroy its identity as a great pond; the public still retained their rights in it. These rights in the littoral owners, and their right of access to the pond over the land taken, were recognized and preserved in the taking.

Exceptions sustained.

ORLANDO MIXTER vs. ALONZO B. WOODCOCK & another.

Worcester. October 4, 1888. — November 27, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Devise — Life Estate — Mortgage.

A testator, leaving a wife but no issue, after appointing her executrix, directing her to pay his debts and pecuniary legacies to relatives "out of my estate," and referring to her in a bequest over of one of the legacies as "residuary legatee," gave his personal property to her absolutely, and devised to her all his real estate "to have and to hold for and during the term of her natural life." Held, that she took only a life estate in the real estate, and that a mortgage given by her did not convey the fee.

WRIT OF ENTRY, dated December 7, 1886, to recover a parcel of land on Fruit Street in Worcester. Plea, *nul disseisin*.

At the trial, in the Superior Court, without a jury, before Aldrich, J., the following facts appeared. John E. Luther, who died on June 1, 1856, leaving a wife but no issue, was seised in fee of the demanded premises, and left a will, which, after

providing for the appointment of his wife as executrix, and directing her to pay "out of my estate" his debts and legacies of three hundred dollars to a brother, and of one dollar each to an uncle and four aunts, proceeded as follows:

"4th. If my said brother is not living, or shall not be living at the time of my decease, said legacy of said three hundred dollars I hereby give to said wife and residuary legatee, meaning and intending this legacy for him alone and not for his children, if he has any living, or shall have at his decease, or his posthumous children.

"5th. I hereby give to my said wife all my household furniture and wearing apparel, to her sole use.

"6th. I hereby give, devise, and bequeath to my said wife and executrix my house and lot on Fruit Street in said Worcester, and all the rest and residue of my estate, real, personal, and mixed, to have and to hold for and during the term of her natural life, free from the control and interference of any husband she may hereafter have, to her sole and separate use."

The only real estate left by the testator was the house and lot on Fruit Street, valued at fifteen hundred dollars, which his wife continued to occupy until her death, on July 26, 1886, his personal property being valued at one hundred and forty-three dollars. The wife remarried, and subsequently gave in her own right, her husband joining, a mortgage of the premises, dated December 2, 1885, to the demandant. The mortgage was duly foreclosed for breach of condition, under a power of sale contained therein, and a conveyance of the premises was afterwards made to the demandant.

The demandant claimed an estate in fee under the will, the mortgage, and the conveyance to him. The tenants made no claim of title, but contended that the testator's wife took only an estate for life under the will in the house and lot, and that the demandant gained no title under the mortgage.

The judge found for the demandant, and reported the case for the determination of this court. If the finding of the Superior Court was affirmed, judgment was to be entered for the demandant; otherwise for the tenants.

J. Mason, for the demandant.

J. H. Bancroft, for the tenants.

C. ALLEN, J. We cannot find in this will anything sufficient to give more than a life estate in the land to Mrs. Luther. The furniture and wearing apparel were given to her without qualification; the house and lot, and all the rest and residue of the testator's estate, real, personal, and mixed, were given to her to have and to hold for and during the term of her natural life. If a life estate to her was intended, the language used is direct, simple, and natural to express that meaning. Any other sense to be put upon the language is conjectural. Nor do we find anything in the other parts of the will to control this meaning. In the fourth article she is referred to as residuary legatee; but this does not enlarge her title under the residuary clause.

The difficulty with the demandant's position is, that, although it may be surmised or supposed that the testator would have given an absolute estate to his wife if his attention had been called to the effect of his will as it stands, the words actually used by him do not bear that construction, and are not sufficient to carry an absolute title. It is suggested that the words may be transposed, and thus be made to bear a different meaning. It is true that words may sometimes be transposed with a view to carry out the obvious intention of the testator, as gathered from the whole will; but the difficulty here is in finding any warrant for making a transposition, which would be departing from a plain meaning in order to reach one which would be far from clear. We cannot make such a transposition for the purpose of seeking to supply an intention not otherwise found in the will. *Hill v. Downes*, 125 Mass. 509.

The construction of the will is the only question that has been argued. There is nothing in the report to show that the demandant sought to recover on the ground of a possessory title, sufficient as against these tenants, and we do not understand that any such question was intended to be presented to us. As the report stands, the entry must be,

Judgment for the tenants.

LUCY HOXIE & others vs. LYDIA FINNEY.

SAME vs. ADELBERT C. FINNEY.

Plymouth. October 16, 1888. — November 27, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Devise with Power to Sell — Reservation of Life Estate.

A testator, by his will, "meaning and intending to make honorable and liberal provision" for his wife, devised to her an estate for life in his entire estate, "with liberty to use and appropriate so much of the principal in addition to the income as she may deem necessary for her comfort and support," with power to sell "the whole or any part of" such estate "at her discretion," the remainder after her death passing to his heirs at law. *Held*, that the wife might, in good faith and without regard to the rights or interests of such heirs at law, reserve a life estate in the real estate, and sell the remainder to obtain means for her support.

TWO WRITS OF ENTRY, by heirs at law of Timothy Manter, to recover parcels of land in Plymouth, sold and conveyed to the tenants, under a power contained in his will, by Susan Manter, his wife, by deeds which reserved to her "a life estate in the premises."

The cases were tried together in the Superior Court, without a jury, before *Thompson, J.*, who ruled, as matter of law, that Susan Manter did not have the right to sell the reversion and retain a life estate in the demanded premises, and that the deeds were invalid; and found for the demandants; and the tenants alleged exceptions. The material facts appear in the opinion.

B. F. Butler & C. G. Davis, for the tenants.

R. O. Harris, for the demandants.

KNOWLTON, J. The second clause of the will of Timothy Manter is in these words: "Meaning and intending to make honorable and liberal provision for my wife, Susan Manter, during her natural life, out of my estate, I do give and bequeath to her the use and improvement of my whole estate, both real and personal, of which I may die seised and possessed, with liberty to use and appropriate so much of the principal, in addition to the income, as she may deem necessary for her comfort and support; and I do authorize and empower her to sell and dis-

pose of the whole or any part of my real and personal estate at her discretion, without the necessity of a license, or of pursuing any of the forms of law, and to change any investments and re-invest from time to time at her discretion; and at her decease, whatever shall then remain of my estate unexpended by my said wife, I dispose of as follows, as also in case my wife dies before me."

On account of the decease, in the testator's lifetime, of all his legatees and devisees except his wife, the remainder after her death passed to his heirs at law, among whom are the demandants. In both cases, the demanded premises are a part of the real estate which belonged to him at the time of his decease, and the tenants claim title under deeds given by Susan Manter, in pursuance of sales made by her of the demanded premises, reserving to herself in each case "a life estate in the premises." She had an estate for life in the premises, with power to sell at discretion, and authority to use the proceeds for her maintenance. The facts found raise, in each case, the same two questions as to the validity of each of the deeds in controversy. First, Were the sales invalid because made without sufficient regard to the rights or interests of the testator's heirs at law? Secondly, Were they invalid because the conveyance in each was only of the remainder after reserving a life estate to the grantor?

The court found that Susan Manter made the deeds "for the purpose of obtaining money for her support, and for the purpose of providing for herself a maintenance for life," and that she had no actual intent to defraud the heirs at law, but that she "had no regard for their rights if any they had." We must construe this to mean, that she used her best judgment and discretion in disposing of the property, with a view to obtain from it the maintenance and support to which she was entitled, with no purpose to defraud the heirs, and with no particular regard for their interests. And we are of opinion that she lawfully might do so. Their rights under the will were only to that which might remain unexpended at her decease; and she was authorized to use of the principal what she might "deem necessary for her comfort and support." Her rights were paramount to theirs, and so long as she acted in good faith in selling the

property for a purpose permitted by the will, she did not transcend her authority.

We are also of opinion, that, under the liberal provisions of this will, she might, in the exercise of the large discretion with which she was invested, retain for her use the life estate which was hers absolutely, and sell the remainder to obtain necessary means of support. In some cases that might be a disadvantageous way of selling, but in some it would not. In a supposable case, it might be the only way not inconsistent with the continuance of the comfort and happiness of the widow, — as where the real estate was her homestead exactly adapted to her needs for residence. In such a case it would be a harsh rule which would not permit her to sell the remainder to obtain money for her support, except upon the condition of giving up her home.

The sales under consideration in the cases at bar were quite unlike an attempt to mortgage where the power given was only to sell, as in *Hoyt v. Jaques*, 129 Mass. 286; and we think it was for the widow to decide whether to sell an estate in fee, or to retain her life estate and sell the remainder.

No questions have been raised as to the form of the deeds, if she was authorized to sell in this way, and it follows that the rulings at the trial were erroneous, and the entry in each case must be,

Exceptions sustained.

LYMAN E. KEITH & another vs. CITY OF BROCKTON.

Plymouth. October 16, 1888. — November 27, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Specific Repairs upon Way — Petition to assess Damages — Time of Filing.

A petition for a jury to assess the damages caused by specific repairs on a way must, under the Pub. Sts. c. 49, § 79, be brought within one year after the order for such repairs is passed, and such time is not extended by § 80, which provides that a party aggrieved by the assessment of his damages "under this chapter" may in certain cases file such a petition "within six months after his land is actually entered upon."

PETITION to the Superior Court, filed on November 21, 1887, alleging that the petitioners were the owners of land on a street in Brockton; that on June 5, 1886, the city council of Brockton established the grade of such street, according to a plan of the city engineer then on file, and passed an order for specific repairs to be made thereon to bring it to the grade so established; that such repairs were duly made, and the grade of the street was lowered, to the damage of the petitioners' land; that the petitioners had no actual notice of the passage of the order, or of any proceedings under it, until less than sixty days before the expiration of one year from the passage of the order; and that no damages had been assessed or paid to the petitioners for the damage so sustained by them; and praying for a jury to ascertain such damages. The answer alleged that the Superior Court had no jurisdiction, because the petition was not seasonably filed.

The Superior Court dismissed the petition; and the petitioners appealed to this court.

I. A. Leach, for the petitioners.

W. A. Reed, for the respondent.

C. ALLEN, J. The order passed by the city council was not for the laying out, alteration, or discontinuance of the way, but it was for specific repairs thereof, by changing the grade according to a plan which was referred to (*Sisson v. New Bedford*, 137 Mass. 255); and according to the general rule in such case, the application by a party aggrieved for a jury must be made within one year after such order is passed. Pub. Sts. c. 49, § 79. But the petitioner contends that he is entitled to an extension of time under the provisions of § 89 of the same chapter. This latter section was founded upon the St. of 1874, c. 341, § 1, which clearly did not include the case of specific repairs, but was limited to the case of "damages sustained by the laying out, widening, altering, relocating, or discontinuance" of a way.

When this section was incorporated into the Public Statutes, in § 89, above referred to, it was expressed as follows: "A person aggrieved by the indemnity awarded to him, or by the assessment of his damages under this chapter, who omits to file his petition for a jury within one year, and who has not received,

at least sixty days before the expiration of such year, actual notice of the proceedings whereby he is entitled to such damage or indemnity, may within six months after his land is actually entered upon for the construction or alteration of a way, or after the actual closing of a way upon discontinuance, file his petition for the assessment of his damages by a jury," etc. Now, the words "under this chapter," near the beginning of this section, would be broad enough to include an assessment of damages for specific repairs; but the later portion of the section shows that only cases of damages by the construction or alteration or discontinuance of a way are intended to be included, because the petition must be filed within six months after his land is actually entered upon for those purposes.

There was no intention of changing the law as it already existed, or of extending the provisions of the St. of 1874, c. 341, § 1, so as to make them include a case of specific repairs.

Petition dismissed.

SUPPLEMENT.

The Honorable WILLIAM SEWALL GARDNER, Justice of this Court from the thirteenth day of October, 1885, to the seventh day of September, 1887, died at his residence in Newton on the fourth day of April, 1888. A meeting of the members of the Suffolk Bar was subsequently held in Boston, at which resolutions were passed, which were presented to the full court on the twenty-seventh day of November, 1888. Before presenting them, the Attorney General addressed the court as follows :

May it please your Honors, — We are met to-day to do honor to the memory of a most excellent, exemplary citizen, a safe counsellor, a sound and reliable advocate, an impartial and able jurist, with a character unblemished, a considerate, pleasant, unostentatious gentleman, and an honest man.

William S. Gardner died at his home in Newton, on April 4th, 1888. He was born in the State of Maine, in 1827, of noted legal ancestry. He was a graduate of Bowdoin College, studied law, and in 1852 was admitted in Middlesex County to the practice of his chosen profession; and in 1853, in Lowell, he opened a law office and commenced his work. He soon formed a copartnership with the late Hon. T. H. Sweetser; and in 1861 the firm moved their office to Boston, and there continued practice till 1875, when Mr. Gardner was appointed one of the Associate Justices of the Superior Court of this Commonwealth, which office he held with marked ability and great credit to the State till October 1, 1885, when he was appointed a Justice of the Supreme Judicial Court, which office he held with distinction till his resignation on the 7th of September, 1887, tendered by reason of his declining health. He held positions of trust in social, literary, charitable, financial, and religious institutions,

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and always with acknowledged ability and approval. He possessed a taste for literature, and wrote well upon various subjects in which he was interested. He was never idle, and yet unassuming. In discharging his duties as a judge he was kind and considerate to all. To the memory of such a man, it is very proper for us who knew him, for our own benefit, and for the information and benefit of the practitioners of our important and honorable profession who are following us all, that we should pause and consider his character, his attainments, and their reward, as manifested in his life.

The Bar of the county of Suffolk have, at a meeting quite recently held, adopted resolutions appropriate to this occasion, and have requested me to present them to the court, and to move that, after hearing such remarks as may be offered by members of the bar and the court, they be ordered entered of record, and that such other action be taken by the court as may be deemed fitting.

The Attorney General then presented the following resolutions:

The members of the Suffolk Bar desire to place on record their sense of the loss which the Commonwealth has sustained in the death of William Sewall Gardner, a former Justice of this Court.

His was a nature that endeared him to those who knew him well, and secured for him the respect and esteem of the community, and the regard and confidence of those who were brought in contact with him at the bar or on the bench.

His experience at the bar, for many years closely associated with one of the ablest lawyers of his day, who studied the law as a science and tested it by the severest rules of logic, and his long service on the bench of the Superior Court, laid a substantial foundation for the successful discharge of the accurate and discriminating investigations demanded of the members of this court.

While the kindliness of his nature might have tempted him at times to take counsel of his sympathies, his keen appreciation of the right constrained him always to exercise "the severe neutrality of an impartial judge."

We desire that this expression of our regard for him, and of the loss we have sustained, be presented by the Attorney General to the Supreme Judicial Court, with a request that it be extended on the records.

Hon. Edward Avery then addressed the court as follows:

May it please your Honors,—I desire to join in the motion submitted by the Attorney General. It was my good fortune to meet Judge Gardner quite frequently while he was at the bar. The eminent ability of his partner, Mr. Sweetser, naturally overshadowed every one who was associated with him in the conduct of a cause; but notwithstanding this I soon learned to appreciate and feel the force and weight of Judge Gardner's powers. His patient investigations, his calm, deliberate judgment, his research and industry, and his practical application of the law to the facts before him, when added to Mr. Sweetser's known force of presentation, were potent factors in the determination of the causes in which they were jointly engaged. His abilities were of the class that are felt rather than seen. As a well equipped, clear-headed, and sound lawyer, he won my respect. Later on, a closer relation with him enabled me to estimate the man, to observe those qualities of the heart that secured for him so many and such strong friends, and to my respect for the lawyer was added a high regard and a warm friendship for the man.

At the time Judge Gardner was appointed to the Superior Court, his ability and legal attainments were not generally known to the Bar of the Commonwealth; but it has been justly said of him, that he soon secured the respect and confidence of the bar,—respect for his integrity and for his keen appreciation of justice, and confidence in his perfect fairness and his earnest desire to rightly understand and impartially administer the law. His subsequent appointment as one of the justices of this court seemed to be generally regarded as a just recognition of one to whom it was safe to intrust the discharge of the highest judicial duties. Judge Gardner was always courteous and considerate at the bar and on the bench; and I think it no light praise to say of him, that while he was on the bench I never knew or heard of any member of the bar who felt that he had received from him an undeserved rebuff or an unmerited rebuke, or who had

been humiliated in his own or his client's estimation by apparent indifference or inattention.

He seemed at all times to realize that ours is a profession in which many may succeed, but in which few indeed can become masters, — a labyrinth having many chambers, into all of which most have looked and but few entered. He was not of those who dazzle us with spasmodic or erratic bursts of brilliancy, or startle us with novel propositions, or overwhelm us with unfathomable subtleties, but of those who exhibit that calm and deliberate strength which ever attends a well rounded mind. The sad events which occasioned his retirement from this court caused a public loss. His death deprived a large circle of friends of one whom they had honored and loved for his many virtues.

Charles Levi Woodbury, Esq., then addressed the court as follows :

May it please your Honors, — Nearly thirty years have I been closely connected with the late Judge Gardner in various ways. My knowledge of him springs not only from association at the bar, and from observation of his ability and his courtesy, patience, and justice as a judge, but from intimate association in many social organizations and the pursuit of many kindred tastes. True it is that always and everywhere character and conduct have stamped their highest qualities on his mind, and commanded for him the respect and esteem of his associates. In a very marked degree has been his success as a presiding officer, not only in judicial but in other organizations, and rare executive ability has characterized his administration as chief of wide-spread organizations whose benevolent and charitable character are well known.

His tastes led him to antiquarian and historical pursuits connected with the early history of New England, and of these organizations themselves. His contributions to the literature of these subjects were marked with accuracy of investigation, purity of style, and chaste eloquence. His investigations in the symbology of mediæval art and architecture bore one fruit in the erection of the church from which he was buried. He was a man of wise and prudent counsels. "Unto him men gave ear, and waited and kept silence at his counsel." He was not long enough on the bench of this court for its reports to embody an adequate monu-

ment of his judicial abilities; his fatal disease tore him prematurely from the field of action.

He was a man of modesty; the duties of office he thought more of than of the honors that attended them. In harmony with the esteem betokened by these last honors to his worth, I am here among my brethren of the bar simply to drop my sprig of acacia on his grave.

Chief Justice Morton responded as follows :

Brethren of the Bar, — We join with the fullest sympathy in your tributes of respect and affection for our deceased associate and friend, by whose death the State has lost an upright, conscientious, and able magistrate, and a respected and useful citizen.

Judge Gardner was born in Hallowell, Maine, on October 1, 1827, so that at the time he was compelled by his failing health to lay down the active labors of life he had not reached the age of sixty years. He was a descendant, on his mother's side, of the eminent family of Sewall, which in the earlier period of our history furnished two Chief Justices of the Superior Court of Judicature of the Province of Massachusetts Bay, and two Justices of the Supreme Judicial Court of the Commonwealth, one of whom, Samuel Sewall, was during the last year of his life the Chief Justice.

He was graduated at Bowdoin College, and afterwards pursued the study of law in Lowell. He was admitted to the bar in 1852, and soon afterwards formed a copartnership with that eminently vigorous and able lawyer, the late Theodore H. Sweetser, and this connection continued until he was appointed a Justice of the Superior Court in 1875. He served in that court for ten years, and gained in the fullest measure the confidence and respect of the bar and of the public. He was regarded by all as a sound lawyer of great ability and of sterling common sense, and was an upright and faithful judge. He performed the various and important duties of that office so successfully, that he won the high esteem of the bar; and when a vacancy occurred on the bench of the Supreme Judicial Court by the death of the late Justice Colburn, the bar with remarkable unanimity looked to Judge Gardner as the fittest person to succeed him.

He was appointed a Justice of this Court in October, 1885, with the general approval of the community. He hesitated somewhat as to accepting the office. Possibly he had some premonitions of failing health which warned him against entering upon new and exacting duties. But he finally accepted the office, and, entering at once upon its duties, devoted himself to their performance with untiring diligence until the spring of 1887, when he was compelled by his ill health to cease from his labors. He hoped that a trip to Europe, involving complete rest and change of scene, would restore his health; but in this hope he was disappointed, and soon after his return felt it his duty to resign his office. He was with us but a short time, but we learned to respect and love him.

He had a powerful and well trained intellect, and a temperament fitted for judicial duties, being patient in hearing and impartial in judgment. He was always self-possessed and courteous in discussions, never uttering a quick or impatient word which he would wish to recall. He arrived at results through careful and thorough investigation; and having a strong sense of what was fair and reasonable, his conclusions were usually sound and reliable. His short service demonstrated that, if his health had remained sound, he would have made one of the most able, useful, and honored members of the court.

Outside of his chosen profession, he was deeply interested in the institution of Freemasonry, and was held in esteem and honor by all the members of that great fraternity. He was also deeply interested in the Protestant Episcopal Church, being a devoted member and an active participant in all the work of this diocese. In all the relations of life he was faithful and true, and therefore honored and respected. We remember with sorrow that the last year of his life was passed in sickness, amid clouds and darkness; but surely we may now rejoice in the faith that he has entered upon an inheritance of light and peace, the reward of a just, upright, and Christian life.

Concurring with the sentiments expressed in your resolutions, we shall order that they, together with a memorandum of these proceedings, be entered upon the records of the court.

The Court then adjourned.

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ERRORS NOTED IN VOLUME CXLVI. OF THIS SERIES.

Page 45, 5th line from bottom, for "c. 154," read "c. 158."

Page 132, in last line of head-note, omit "and."

Page 492, in 6th line from top, insert "no" before "doubt."

Page 552, 18th line from top, for "plaintiff" read "plaintiffs."

Page 559, in 4th line of first head-note, read "lessee" for "lessor," and in 9th and 10th lines from bottom, read "lessees" for "lessors."

Page 653, at end of title "Partnership," add "Agreement *held* to constitute, *Dame v. Kempster*, 454."

HARVARD UNIVERSITY

